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NO. 458

IN THE

# Supreme Court of the United States

OCTOBER TERM 1942

GEORGE SYLVESTER VIERECK,
*Petitioner,*

v.

THE UNITED STATES OF AMERICA,
*Respondent,*

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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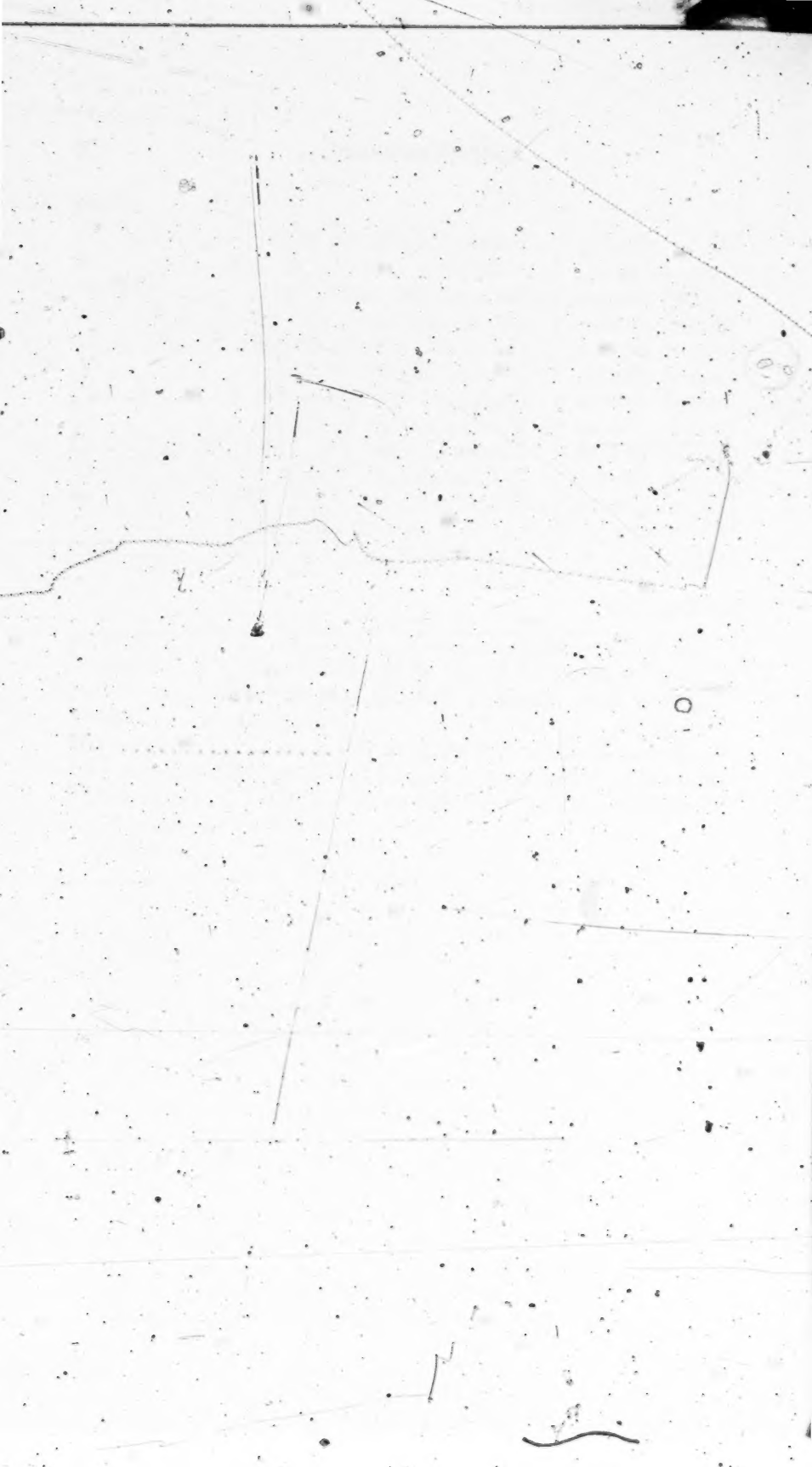

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## BRIEF FOR PETITIONER.

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### JURISDICTION.

This Court granted a writ of certiorari on November 14, 1942, to review this case except with respect to the first question presented by the petition which raised for the first time the jurisdictional question as to the validity of the indictment, because of the purported extension of the grand

jury from the July 1941 to the October 1941 Term of the District Court of the United States for the District of Columbia and which grand jury brought in the indictment during the extended term. 87 U. S. Law ed. 132.

The jurisdiction of this Court to grant the writ of certiorari to review the judgment of September 21, 1942, by the United States Court of Appeals for the District of Columbia is found in Section 240 of the Judicial Code as amended (28 U. S. C. 347). See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

## OPINION BELOW.

The trial court wrote no opinion in the case. The opinion of September 21, 1942, by the United States Court of Appeals for the District of Columbia has not been reported. However, this opinion is contained in the Record (R. 328).

## STATEMENT OF THE CASE.

### The Indictment.

A non-interventionist with respect to the affairs of Europe since at least 1914, or for more than a quarter of a century, and a registered agent of: (1) a Munich newspaper (*Muenchner Neueste Nachrichten*) from September 26, 1939 (R. 20) to September 8, 1941 when that agency contract was cancelled (R. 90), and of (2) the German Library of Information from October 12, 1939 (R. 25-26) to July 2, 1941, when that contract, too, was cancelled (R. 52-53), petitioner was indicted on October 8, 1941 (R. 319) by a grand jury impaneled, sworn and charged during the July 1941 Term of the trial court and the life of which jury the trial court purported to extend into the October 1941 Term of said court.

The indictment was in five counts. Counts I and IV related to original registration statements which petitioner

filed on forms prescribed by the Secretary of State while Counts II, III, and V related to supplemental registration statements which petitioner likewise filed on forms prescribed by that official. The indictment in each of the five counts charged that the petitioner "unlawfully, willfully, feloniously and knowingly omitted to state and set forth the fact" of certain alleged activities named in the respective counts when he answered "Author and Journalist" to paragraphs 11 of the two original and three supplemental registration forms which required, in identical terms, that he:

> "Give a comprehensive statement of nature of business of registrant."[1]

The first original registration statement—covered by Count 1 of the indictment—was filed with the Secretary of State on September 26, 1939 (R. 20) for the Munich newspaper, and to this registration statement, the Secretary of State attached the contract between petitioner and the German Library of Information (R. 25-26) which petitioner had sent with his letter of October 7, 1939 to the Secretary

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[1]Mr. Hickey, one of Government counsel in the case, stated to the jury panel that: "Now, the defendant is an admitted propagandist" (Tr. 31) to which counsel for petitioner objected. Again Mr. Hickey stated that petitioner "is charged by the Government with willfully omitting to state material facts concerning the nature and extent of his propaganda activities required under the act to be disclosed and made known to the American public." (Tr. 32). Again counsel for petitioner objected but the court stated "I see no trouble about it. I think inquiry is a proper one. You may proceed" (Tr. 32-33).

Mr. Maloney suggested to the trial court, in the presence of the jury panel that the court inquire whether despite the opinion of a member of the panel on the subject of propaganda: *"if he still feels that he could give this defendant a fair trial on the evidence presented in this courtroom and lay aside entirely his feeling that although he had been unpatriotic, we, of course feel that he is entitled to a fair trial just like anybody else regardless of whether they have been patriotic or not."* (Tr. 57). (Italics mine.)

of State (R. 83) and the letter so notified the petitioner in letter of October 12, 1939 (R. 84). This contract was subsequently expanded and the compensation increased in another contract dated January 25, 1941 (R. 48-50) which was attached to a supplemental statement filed April 25, 1941 (R. 44-50).

The second original registration statement—covered by Count IV of the indictment—was filed on March 17, 1941 (R. 37-41). Under this registered contract the petitioner agreed to act as the publisher in America of a book entitled, *The One Hundred Families That Rule the Empire.*[2] The indictment was filed before a supplemental registration statement was due under this second original registration. The three supplemental registration statements under the first original registration—and which three supplemental registrations were respectively the subject of Counts II, III and V of the indictment—were filed on or about April 26, 1940 (R. 30-34); October 25, 1940 (R. 30-34) and April 25, 1941 (R. 44-50).

Thus during the period from September 26, 1939, when the first original registration statement was filed, to April 25, 1941, when the third and last supplemental registration statement was filed, there was in effect the Neutrality Act of November 4, 1939, c. 2 (54 Stat. 4), (22 U. S. C. 441-452), except for the short period from September 26, to November 3, 1939. Further, during all of this period—to and after the date of the indictment—the United States maintained diplomatic relations with the German Reich.

In addition, the petitioner cancelled his contracts of employment with the German Library of Information on July 2, 1941 (R. 52-53) and the State Department was advised by petitioner of such cancellation in letter of July 16, 1941 (R. 51). The contract with the Munich newspaper was can-

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[2] There had been published in the United States in 1937, by the Vanguard Press, *America's Sixty Families*, by Ferdinand Luneberg purporting to describe the Sixty Families who ruled the United States.

celled and the Secretary of State advised thereof in letter dated September 8, 1941, from petitioner (R. 90). The contract with Wirsing was completed by the publication of the book.

The Court will take judicial notice of the fact that during a part of this period covered by the original and supplemental registration statements filed by petitioner, a political campaign was waged in the United States for the office of President of the United States and that the candidates of the two principal political parties advocated the keeping of the United States out of the war then raging on three continents. It was not until the Act of November 17, 1941, c. 473, (55 Stat. 764), that the Neutrality Act of November 4, 1939, was substantially repealed and until the Lend-Lease Aid Act of February 7, 1942, c. 46 (56 Stat. 82) that Lend-Lease aid was provided for the Allied Nations.

Petitioner's contracts were cancelled and terminated long before the Act of November 17, 1941, and long before Pearl Harbor on December 7, 1941, and the resulting declaration of war against the Axis powers—the contract with the German Library of Information having been cancelled on July 2, 1941, and the one with the Munich newspaper on September 8, 1941. It is most important for an understanding of this case to bear in mind the chronology of these facts.[8]

[8]It was on February 6, 1942, that the Government's chief prosecuting attorney, Mr. William Power Maloney, stated in open court and in the presence of the press representatives, in opposing clemency for one Hill who had been convicted of perjury for denying that he knew petitioner, that:

> "This man is still shielding Viereck, a sworn enemy of this country." (R. 230-231).

The Attorney General of the United States was officially notified by counsel for petitioner that: "Such statement was prominently published by every newspaper in the District of Columbia. It was even the basis of an editorial in the Washington Post." (R. 232-233).

Also, in his opening statement to the trial jury, Mr. Maloney stated with reference to the petitioner:

**Petitioner's Answer to Paragraphs 11 of the Original and Supplemental Registration Forms.**

The requirement in Paragraphs 11 of the two original and the three supplemental registration forms was a generic requirement that a registrant:

> "Give a comprehensive statement of nature of business of registrant."

The answer "Author and Journalist" was a generic answer. Petitioner is an author of considerable note, having

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> "And in addition to his literary efforts, self-proclaimed master of the insidious art of propaganda, George Sylvester Viereck, self-proclaimed master of the insidious art of propaganda, not alone in this war but in the last war as well, at which time he was also in the employ of the German government as you ladies and gentlemen shall see as well as hear." (Tr. 186).

In answer to the objections of counsel for petitioner to such statements (Tr. 186), the trial court stated that he would "ask Mr. Maloney to be as brief as he can." (Tr. 187).

And notwithstanding that petitioner had ceased long before the United States entered the war to be an employee of any foreign principal, Mr. Maloney stated in his closing argument to the jury that:

> "In closing, let me remind you, ladies and gentlemen, that this is war. This is war, harsh, cruel, murderous war. There are those who, right at this very moment, are plotting your death and my death; plotting our death and the death of our families because we have committed no other crime than that we do not agree with their ideas of persecution and concentration camps."
>
> "This is war. It is a fight to the death. The American people are relying upon you, ladies and gentlemen, for their protection against this sort of crime, just as much as they are relying upon the protection of the men who man the guns in Bataan Peninsula, and everywhere else. They are relying upon you, ladies and gentlemen for their protection. We are at war. You have a duty to perform here."
>
> "As a representative of your government I am calling upon every one of you to do your duty." (R. 159).

written many books and magazine articles since at least 1907 (R. 168). It was conceded by the chief prosecuting attorney that the "Government has never maintained anything other than that this man was a prolific writer.*** I am willing to concede that he wrote a lot of articles, or whatever the number is, for *Liberty.*" (R. 175). Also, "before going further it might be well to introduce you ladies and gentleman to this defendant, George Sylvester Viereck, Poet-Extraordinary, Author over a long period of time of a number of books, including such masterpieces as "The Kaiser on Trial', 'My First 2,000 Years', 'Salome, the Wondering Jewess' and many others." (Tr. 186).

With respect to the answer of petitioner to this paragraph 11 of the supplemental registration statements, it is to be noted that: Crabb's *English Synonyms* (Harper's New Edition with Additions and Corrections), at pages 170-171, defines "business" as follows:

> "BUSINESS signifies what makes *busy*, v. *Active*, busy. OCCUPATION, from *Occupy*, in French *occuper*, Latin, occupo, that is *ob* and *capio* signifies that which serves or take possession of a person or thing to the exclusion of other things. EMPLOYMENT, from *employ*, in French *emploi*, Latin, *implico*, Greek * * *— signifies that which engages or fixes a person. ENGAGEMENT, v. *to attract*. AVOCATION, in Latin *avocatio*, from *a* and *voco*, signifies the thing that calls off from another thing.
>
> *Business* occupies all a person's thoughts as well as his time and powers; *ocupation* and *employment* occupy only his time and strength; the first is mostly *regular*, it is the object of our choice; the second is *casual*, it depends upon the will of another. *Employment* is a partial *employment*, *avocation* a particular *engagement;* an engagement prevents us from doing anything else; an *avocation* calls off or prevents us from doing what we wish. Every tradesman has a *business*, on the dilligent prosecution of which depends his success in life; every mechanic has his daily *occupation*, by which he maintains his family; every laborer has an *employment*, which is fixed for him. Business and occu-

pation always suppose a serious object. *Business* is something more urgent and important than *occupation;* a man of independent fortune has no occasion to pursue *business* but as a rational agent he will not be contented to be without an *occupation.* * * *

BUSINESS, v. *Business, occupation.* Trade signifies that which employs the time by way of *trade.* PROFESSION signifies that which one professes to do. ART signifies that which is followed in the way of the *Arts.* These words are synonymous in the sense of a calling, for the purpose of a livelihood: *Business* is general, *trade* and *profession* are particular; all trade is business, but all business is not trade; but the exercise of one's knowledge and experience for purpose of gain constitutes a business; brokers, manufacturers, bankers, and others carry on a *business;* clergymen, medical or military men, follow a *profession;* musicians and painters follow an *art.* * * * ".

Petitioner, as an author and journalist all of his mature life, followed a business of writing books, poems, and magazine articles. When he was asked in Paragraphs 11 of the registration forms to give a comprehensive statement of the nature of his business, he rightfully and correctly answered: "Author and Journalist." As he was not proven to be a man of independent means, it must be assumed that as a "prolific writer" of books and magazine articles, he was writing to earn a livelihood and that was his business.

In fact, it was precisely as an author and journalist that he contracted to serve the Munich newspaper and the German Library of Information and he in fact did so serve them.

**Counts in Indictment Relating to Original Registration Statements Stricken Therefrom on Demurrer.**

Petitioner filed a demurrer to the indictment (R. 53, 319). The District Court, Goldsborough, J. sustained this demurrer as to Counts I and IV relating to the three agencies for foreign principals covered by the two original regis-

tration statements. However, he overruled the demurrer as to Counts II, III and V of the indictment relating to the three supplemental registration statements (R. 56, 319). The trial was set for January 12, 1942 on these three counts (R. 320). A motion for a bill of particulars was filed on January 7, 1942, but denied by Judge Goldsborough on January 19, 1942 (R. 1320).

**Government Prosecutor Filed Affidavit of Bias and Prejudice Against Judge Goldsborough.**

Judge Goldsborough had set the petitioner's case down for trial before him but on the same day that he denied the motion for a bill of particulars, Mr. William Power Maloney, the Government's chief counsel before the grand jury in obtaining the indictment and the chief trial counsel, filed an affidavit of bias and prejudice against the said Judge. He directed the entry of an order on the same day denying the motion based on such affidavit (R. 320). The next day, January 20, 1942, this affidavit of bias and prejudice was withdrawn (R. 320). The case was assigned to Letts, J. for trial but a copy of the affidavit of bias and prejudice filed by Mr. Maloney was made by petitioner a part of his motion for a change of venue and thus the said affidavit was retained in the record (R. 60-69).

The motion for change of venue was denied but renewed before Letts, J. at the commencement of the trial and again denied (R. 228-234, 322).

**The Trial and Conviction of Petitioner.**

The preceding summary of record facts is sufficient to show to this Court the setting of the stage for the conviction of the petitioner, without ever proving or attempting to prove that the alleged "activities" charged in Counts II, III and V of the indictment were engaged in by petitioner for or on behalf of any foreign principal or that petitioner received a single dime from any of his three foreign princi-

pals for engaging in such "activities" and that neither Section 30 of the 1938 Act as amended, nor Paragraphs 11 of the registration forms required him to report them.

The trial court's instructions to the jury removed all necessity for any such showing on the part of the prosecution (R. 101-104). In giving these instructions—granting the prayers of the prosecution and denying the contrary prayer of the petitioner (R. 96-101)—the fate of this petitioner was sealed before this jury. Under such instructions it could not have done otherwise than bring in a verdict of guilty as charged in the indictment.

**(a)**

**How this was accomplished.**

The conviction of the petitioner was accomplished primarily by three things: (1) The introduction at the outset of the prosecution evidence of a book, *Spreading Germs of Hate*,—which was published serially by the petitioner in the *Saturady Evening Post* and later, 1930, in book form—concerning propaganda activities in the United States on the part of England, France, Germany, Italy, and the United States prior to, and during the first World War, from 1914 to 1918, and the reading of copious extracts therefrom to the jury during the progress of the trial; (2) by linking the non-interventionist activities of the petitioner with the non-interventionist activities of prominent members of the Senate and House of Representatives; and (3) the attempt to show—which was never accomplished except by the most tenous evidence—that the petitioner was associated with others in the formation and conduct of certain non-interventionist Committees.

(1)

*The Introduction and Use of Spreading Germs of Hate.*

It is one of the ironies of fate that this book (Gov. Ex. 12) should have been admitted in evidence against the petitioner and should have been used as one of the most potent weapons to bring about his conviction. Col. Edward M. House in his foreword of March 5, 1930, to the book stated that it would serve "to remind us how foolish and partisan we can be in times of high emotional tension" and now:

> "That the world has become calm and reason once more rules, we can read with pleasure and interest such a book as Mr. Viereck has written, and wonder how and why we so nearly lost our balance during the trying days of the Great War."

The petitioner stated in his Introduction to the book that if it "contains dynamite, I explode it not to work havoc but to clear away much poisonous rubbish" and that:

> "Propaganda is the primary weapon of the world's invisible government. The microbes it scatters infect humanity like a plague. My book is an attempt to administer an antidote or a serum against this scourge by inculcating Propaganda Resistance. No one can escape the propagandist. But if we become propaganda-conscious, we may in time develop a measureable degree of immunity. With this object in view, I narrate here, for the first time, the part played by propaganda in the United States during and after the War." (Pp. xii-xiii).

This book, which examines the propaganda activities of England, France, Germany, Ireland, and the United States in this Country during and after the first World War was received in evidence under the following circumstances:

By Mr. Maloney:

"Q. Tell us about some of the stuff that is not poetry that he has written. A. 'Spreading Germs of Hate.'

"Q. Did he tell you that he had written a book by that title? A. Yes, sir.

"Q. Did you ever see it in his library at 305 Riverside Drive, New York City? A. Yes, I have seen it.

"Q. I show you this book, 'Spreading Germs of Hate' by George Sylvester Viereck (handing book to witness). Is that the book he wrote? A. Yes.

"Mr. Morosini: It is not a question of the fact that defendent wrote this book, 'Spreading Germs of Hate,' we merely object to it at this time or object to any reference to it at this time on the ground that it is not properly a part of the Government's case or has any reference to it, as far as the Government's case is concerned, and does not come within the indictment.

"The Court. It may be received. Has it been offered?

"Mr. Maloney. It has been offered.

"The Court. It may be marked in evidence.

"(Government Exhibit No. 12 is marked in evidence)" (R. 123).

This is the book, which prior to this occurrence, the Government's Chief Prosecuting attorney, Mr. William Power Maloney, had held aloft to the jury in his opening statement and said:

> "Ladies and gentlemen, in the course of this trial I will give you a definition of 'propaganda'—I will give you the definition of what it is, that the defendent himself makes, what he considers propaganda to be, and I submit to you, ladies and gentlemen, it is a pretty good definition of 'propaganda.'
>
> "I hold here in my hand a book. This book will be the text of the Government and the obituary of this defendent.
>
> "The title is 'Spreading Germs of Hate,' by George Sylvester Viereck.

"* * * Now, the Government will show in this case that the aim of the German propaganda, as it was carried out by this defendent, was threefold, and is threefold, or was, rather, up until December 7th.

"The first of these objectives was to strengthen Germany; the second to weaken her enemies; and third to keep America out of war.

"These are the three objectives of the present German propaganda. I might add that they differ in not one respect from the objectives of German propaganda in the last war, as we will show you.

"We will show you, and I submit this is proper as bearing upon prior similar acts of this defendent, that this defendent was one of the three masterminds of the German propaganda in the last war. In fact he was a member of what was then known as the German propaganda cabinet in this country, and here we have, as you will see, an identical picture following the same lines, and seeking to obtain the same objective." (Tr. 188-189).

This is the same book that Mr. Maloney again held aloft to the jury in his closing argument to the jury and stated that this book "was the text of the Government and the epitaph of this defendant" (R. 134).

This is the same book from which Mr. Maloney wrenched a statement on page 76 that:

"In the battle of propaganda that now ensued, those American citizens of German descent who had taken up the cudgels for Germany were called 'disloyalist,' 'traitors' and 'Huns' by the pro-Allies. Colonel Watterson denounced the editor of The Fatherland as a 'venom-bloated toad of treason.'

and stated to the jury in his closing argument that:

"You have heard him described variously as good, patriotic American citizen; as a great author and journalist; as a man who wanted to do an honest job for America, and all the rest of it.

"Now I will give you a description of himself from his own book: 'A venom-bloated toad of treason.'

"Ladies and gentlemen, he must have thought well of that description. He must have thought it pretty accurate because he printed it in his own book at page 76. That is a description to which I do not care to add a single word." (R. 138).

This is the same book from which Mr. Maloney quoted in his examination of Congressman Hamilton Fish as follows:

"Speaking of patriotism, then, Mr. Fish, you do not agree with the defendent Viereck when he wrote as follows: 'It has been said that patriotism is the last resort of the scoundrel.' " (R. 134).

Also, it is the same book to which Mr. Maloney referred in his redirect examination of Congressman Fish, whose views in the subject had never been heard by the jury, as follows:

"Q. Do you know, Mr. Fish, that in 1930 this good American citizen, Mr. Viereck, wrote a book called 'Spreading Germs of Hate' in which he said, and I quote from page 65, 'The objective of German propaganda was three-fold; to strengthen and replenish Germany; to weaken and embarrass Germany's foes, and to keep America out of the war?' Do you know that he wrote such a book? A. No, I do not, I have never read the book.

"Q. Is it not a coincidence that his views as a German propagandist coincide so closely with your views as a Congressman at this time? A. No, it is not. How do you mean? I don't understand that question at all. What do you mean by it?

"Mr. Maloney. I have no further questions." (R. 133-134).

No possible opportunity seems to have been overlooked by the prosecution to impress upon the jury that petitioner was a "propagandist" and that he had written a book on propaganda. It was not overlooked in the Government's brief in opposition to the petition in this Court for a writ of certiorari. When Government witness Spielman was

on the stand, the Government prosecutor inquired apropos of absolutely nothing to which the witness had theretofore testified:

> "Q. Have you ever read this book. Government's exhibit 12, by George Sylvester Viereck and entitled 'Spreading Germs of Hate?' A. No. Perhaps I should have." (R. 132).

The prosecutor then read the last sentence in the last paragraph on page 118 of the book, which was likewise apropos of nothing being presented to the jury, the sentence being:

> "Nevertheless, German propaganda in the United States cannot be pronounced a failure if its object was to keep America out of the war from August 1914 to April 1917." (R. 133).

After having read this sentence, the prosecutor then inquired of the witness Spielman, who had been a clerk in the office of the late Senator Lundeen,: "Q. And you testified that is what Senator Lundeen was trying to do, is that correct?" The witness did not answer the question and it was not repeated (R. 133). This was another attempt of the Government prosecution to create a sinister atmosphere by trying to "smear" a dead United States Senator.

Having once secured the admission of the book *Spreading Germs of Hate*, into evidence, the prosecutor immediately began to capitalize thereon and in addition to the foregoing, commenced to read fragments from it—omitting a sentence here on page 10 (R. 124), then skipping a paragraph there (R. 124), jumping over to page 55 (R. 125), then back again to part of page 51 (R. 125), reading a paragraph and skipping others and then going back to page 61 and quoting the last paragraph (R. 125); returning to page 51 and reading the next to the last paragraph (R. 127); later going to page 104 and reading a few lines, interspersed with his comments (R. 127-129), then going to page 223 of the book and reading

another paragraph, apparently for the sole purpose of bringing before the jury the fact that Judge Daniel F. Cohalan, the father of petitioner's co-counsel, Daniel F. Cohalan, Jr., addressed German-American audiences prior to America's entrance into the first World War (R. 129-131).

Enough has been shown that this book concerning events more than a quarter of a Century before this indictment and published more than ten years before the same, was indeed the "text of the Government and the epitaph of this defendant!"

(2)

*Linking the Petitioner with Non-Interventionist in Congress.*

The petitioner had long been a professed and confessed non-interventionist. During almost the entire period that he was acting for his foreign principals, the United States was operating under the Neutrality Act of November 4, 1939, and during the entire period, and for months after the petitioner ceased to be an agent for any foreign principal, the United States Government maintained diplomatic relation with the German Reich. Moreover, during a large part of this period, the two principal political parties in the United States were waging a fight for the office of President of the United States. Both President Roosevelt, who was a candidate for election to a third term, and Wendell Wilkie, his opponent, pledged the American people that their sons and daughters would not be sent to fight on foreign shores!

"Birds of a feather flock together," it is said. Nothing could be more natural than that the petitioner would seek the advice and assistance of those who believed with him that the United States should not intervene in the Second World War on the side of either party thereto. There was a considerable number of these non-interventionists before Pearl Harbor and December 7, 1941, in Congress, but an attempt was made to link petitioner with only a few of them, including the late Senator Ernest Lundeen of Minn-

esota, Senator Holt, of West Virginia, Congressman Fish of New York and Congressman Stephen O. Day of Illinois, and to make out that they were engaged in something sinister and unpatriotic.

As to Congressman Fish, the testimony heretofore quoted indicates something of the relationship between him and the petitioner.[4] It needs only to be added that his clerk, one witness Hill, had denied before a grand jury that he knew petitioner and had been convicted of perjury. He was a star witness for the prosecution (R. 290-301). While it does not appear of record in this case, it is a fact that his sentence was very much reduced after the conviction of petitioner. It was before the trial of petitioner and when witness Hill was before the court for sentence that prosecutor Maloney, in opposition to clemency, made the above quoted statement that:

> "This man is still shielding Viereck, a sworn enemy of this country" (R. 231).

It was the same Congressman Fish that prosecutor Maloney attempted to heckle as above set forth.

The only connections between the petitioner and witness Hill are: (1) That petitioner consulted him with respect to mailing out reprints of an address made by Senator Lundeen on the floor of the Senate entitled "Six Men and War," for which he was paid by Senator Lundeen (R. 279-283), and (2) that petitioner obtained from him two mailing lists, for which petitioner paid him $100 each.

With respect to Senator Lundeen, another confirmed non-interventionist, in addition to acting as an intermediary with Hill in having mailed out copies of the reprints from

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[4]Except the prosecution offered through the witness Butler from its files of *Liberty* magazine, and the Court admitted over objections, a memorandum of November 26, 1937, from petitioner to the editor of that magazine, reporting the willingness of Congressman Fish to collaborate in writing an article on the necessity of a war referendum. (Tr. 1346-1349).

the Congressional Record of his speech, "Six Men and War," the petitioner assisted the Senator in preparing two or three speeches non-interventionist in character (R. 265). These were "Six Men and War," "Contributions of German-Americans to the United States," and "Lord Lothian against Lord Lothian," the latter being a contrast in parallel columns of inconsistent statements made by the distinguished British Lord[5].

Prosecutor Maloney in his summation to the jury referred to Congressman Fish as "that Fish of foul memory" (Tr. 1586) and "Last but not least we come to the Fish in question. That windy warrior who cowered in his tent while this poor, unfortunate clerk took the rap for shielding him. That great American who took refuge in invective when asked a direct question" (Tr. 1566).

Mr. Maloney also referred to the late Senator Lundeen as follows:

> "The name of Senator Lundeen has been brought into this case, as I told you it would. It is not a pleasant task, not a pleasant task to bring in the name of any man, living or dead. Facts are facts and the American people are entitled to know. A public office

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[5]In an apparent effort to smear Senator Lundeen and prejudice the jury, Prosecutor Hickey brought out in the testimony of Witness Spielman (R. 304-305, Tr. 883-885) that the Senator had a system of so-called "kickbacks" in his office. Also, from the witness Johnson, another employee in that office and which evidence was objected to by counsel for petitioner, (Tr. 946-947) but the objections were overruled.

Apparently a question arose in the income tax returns of Senator Lundeen and the former employees of his office made written statements with respect thereto which were filed with the Bureau of Internal Revenue, to the effect that the deductions were used for office expenses and not for the personal use of Senator Lundeen. Witness Norma Ward Lundeen, not having the original statements, was not permitted to testify with respect thereto (R. 305-308) nor was the Bureau of Internal Revenue required to produce the original written statements pursuant to subpoena (R. 308-310).

All of this was highly prejudicial to the petitioner.

is a public trust.' These are the words of President Roosevelt, 'A public office is a public trust.'

"Senator Lundeen? Possibly more fool than rogue. Certainly something of both. Certain it is that those girls kicked back part of their salary to him. He called it a reserve fund. That which is called a rose by any other name would certainly smell as sweet. Others have a shorter and an uglier term for the same practice. It has been called 'extortion'[6].

"What a tragic picture: a United States Senator chained as a vassal to the wheel of Goebbels propaganda chariot, and they call us to account for smearing him. We did not make the facts. We have disclosed them to the American people, as it is our duty to do (Tr. 1565-1566).

With respect to the then ex-Senator Rush Holt, another isolationist, the only connection the petitioner was shown to have had with him was to consider the publication of excerpts from his addresses, published in the Congressional Record, as a book. For some reason not clearly appearing, it was concluded not to publish the excerpts as a book and some of them were intercepted by the British censor in Bermuda in the mail from New York of July 1, 1941, to a European resident, identified as the German ambassador to Portugal (R. 207). In referring to Senator Holt, the Government prosecutor in his closing address to the jury stated:

"Senator Holt? Senator Holt, the American people want an explanation of his ready acceptance of this German propaganda as a collaborator of his book, and the American people are entitled to an explanation of why the German foreign office was so interested in his proposed manuscript (Tr. 1566).

Not even former members of Congress were spared. Hon. John J. O'Connor who had defended the Witness Hill in the perjury indictment was referred to as follows in the closing argument to the jury:

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[6]See footnote [5] of this brief.

> "John O'Connor? John O'Connor; bumptious, bungling John O'Connor, whose sole contribution to the cause of American justice was to suppress the truth when that poor, unfortunate Mr. Hill wanted to tell it. We are accused of smearing him. We are accused of smearing O'Connor, the henchman and counsel of that Fish of foul memory" (Tr. 1566).

This chief prosecuting attorney having attacked Judge Goldsborough by the affidavit of bias and prejudice thus attacked former and present members of the Senate and House of Representatives in a trial of petitioner for his liberty—an attack which had nothing whatever to do with the question whether the answer of "Author and Journalist" was a fairly responsive answer to the generic requirement in paragraphs 11 of the supplemental registration forms:

> "Give a comprehensive statement of nature of business of registrant."

(3)

*Immaterial but prejudical evidence.*

With the witness Webber on the stand for the prosecution, it was brought out that in the study of petitioner at 305 Riverside Drive, New York, New York, there were photographs of Hitler and Goebbels (R. 142-146). This witness could not remember seeing photographs of a large number of others on the walls of the study (R. 146).

Also, with the witness Butler on the stand, there was introduced in evidence by this prosecuting attorney a letter from petitioner and a reply from the editor of *Liberty* Magazine, with a memorandum, concerning an article which appeared in that magazine to the effect that the maid in Hitler's house was something more than a housekeeper (R 151-153).

All this had nothing whatever to do with whether the petitioner correctly answered paragraphs 11 of the supple-

mental registration statements and was calculated,—as was the charge that he was an enemy of his country—to prejudice the petitioner.

(4)

*Petitioner and Flanders Hall.*

As a part of petitioner's non-interventionist activities on his own behalf and without any compensation having been shown by the prosecution to have been obtained by him from any source, the petitioner became interested in a small publishing company in New Jersey, known as Flanders Hall, Inc. This company, which had no printing press of its own, had been organized to have printed and marketed a book written by one of its incorporators and which book was not a success.

Petitioner entered into a contract with this company whereby he agreed to make certain loans to the company, with an option—which was never exercised—to purchase 66 2/3 per centum of the capital stock and petitioner retained authority to approve all expenditures (R 249-251). During the time in question petitioner advanced a total of $22,500 to the company and was repaid a part thereof (R. 253-257) including a part of the sum named in the next paragraph.

This company published *One Hundred Families That Rule the Empire* which petitioner had agreed to publish in America for Wirsing and for which he had been advanced $10,000 for printing, advertising, etc. Also the company published a number of other booklets for the petitioner which are listed in a footnote on pages 8 to 10 of the respondent's brief in opposition to the petition for certiorari.

Practically, if not all, of these booklets were either non-interventionist in character or highly critical of England,

both as to social and economic conditions in England itself as well as its imperialistic practices in Egypt, India, South Africa, and elsewhere.[8]

It was not even claimed by the Government, much less proved, that there was anything in these booklets which was subversive or hostile to the United States Government and certainly we have not reached the position in this country that a citizen of the United States is to be punished for printing a booklet—or dozens of booklets—not subversive or hostile to the United States Government or that he may be punished for printing a booklet—or dozens of booklets—critical of some foreign power.

Whatever may be the views of the Court or counsel as to the correctness of such arguments, the fact remains that opinions, even in high quarters, are changing in respect to these matters, as shown by footnotes 7 and 8 hereto. In any event, the course of England in these matters was a legitimate subject of argument.

Further, with the exception of the booklet, *One Hundred Families That Rule the Empire*—for which the petitioner

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[7]Sir William Beveridge in submitting on November 20, 1942, a report of the Interdepartmental Committee on Social Insurance and Allied Services for post-war reconstruction in England proposed a plan for overcoming want in the British Isles, thereby, in effect, recognizing the poverty-stricken conditions of many English people which were the subject of criticisms.

[8]The Atlantic Charter, which was drawn up by President Roosevelt and Prime Minister Churchill, signed by them, and published in the Congressional Record for June 11, 1941, p. 5352, seemingly recognized the imperialistic policies of all governments practicing them which, of course, included the English government.

Wendell Willkie, in his address of October 26, 1942, to the Nation after his journey to the allied nations stated, among other things, (Congressional Record, A. 4156-4159) that:

> "In Africa, in the Middle East, throughout the Arab world, as well as in China and the whole Far East, freedom means the orderly but scheduled abolition of the colonial system. I can assure you that this is true. I can assure you that the rule of people by other people is not freedom, and not what we must fight to preserve."

was agent for its publication and for which agency a registration statement was filed—there was absolutely no showing or attempted showing that the petitioner received one dime from any foreign principal for the publication of these booklets. On the contrary, the evidence is undisputed that petitioner lost several thousand dollars of his loans to Flanders Hall, Inc., in this publishing venture. (Gov. Br. p. 18 opposing certiorari). However, there was absolutely no reason why petitioner could not have registered as the agent of a foreign principal or principals—if in fact he had been such—for the publication of these booklets just as he did register for the publication of *One Hundred Families That Rule the Empire.*

(5)

*Mailing of reprints from the Congressional Record.*

There were a great many reprints of addresses and articles from the Congressional Record which were mailed out by both the interventionist and the non-interventionist before Pearl Harbor and December 7, 1941. Whether we agree or disagree with the arguments of either side, they had a legal right to make such arguments in the United States in an effort to win as many adherents as they could.

The petitioner was not permitted to prove the number or character of the reprints which were mailed out by the interventionists. (R. 195). An offer of proof was made by petitioner and rejected that one million copies of a certain interventionist speech inserted in the Congressional Record were purchased and mailed out. (R. 196). Petitioner offered proof from the records of the Government Printing Office with respect to the purchase and mailing out of the reprints from the Congressional Record but this offer of proof was likewise rejected (R. 188-194).

The prosecution was permitted to show that a large number of non-interventionist reprints from the Congressional Record were purchased by the Witness Hill and mailed out, either by him or by one of the War Debts Committee (R.

288-301). The only direct evidence that petitioner was connected with mailing out of any of these reprints was the reprint of the address by Senator Lundeen entitled "Six Men and War", as to which, as heretofore stated, petitioner acted as an intermediary for Senator Lundeen in personally talking with Hill (R. 287, 282). The Senator and not petitioner paid Hill for mailing them out.

The Government in its brief in opposition to the petition for certiorari (pp. 11-13) attempts to make it appear that petitioner conceived and organized, with Senator Lundeen, Prescott Dennett and Linn Gale, the "Islands for War Debts Committee" and that since Dennett paid for many of these non-interventionist reprints and mailed them out, the petitioner is somehow responsible for so doing and that the same constituted a business "activity" on his part.

The evidence upon which the Government relies to establish that petitioner had anything to do with organizing this Committee consists of the testimony of the witness, Mrs. Webber, that petitioner "told us that he had organized the committee" (Tr. 546) and that "he said he organized the "Make Europe Pay War Debts Committee" (Tr. 547). Mrs. Webber's husband, who was present at the time, testified that petitioner "told us, rather, that Senator Lundeen, Linn Gale, and Prescott Dennett had formed the Committee, and to the best of my knowledge Mr. Viereck said that it was his idea" (Tr. 501-592). Mrs. Webber later contradicted both herself and her husband and stated that petitioner "told us, yes, he said it was their idea or words to that effect" (R. 288).

The two Webbers were clerks employed by the Committee. They did minor clerical work, such as addressing envelopes, etc., and it was not shown that they were in any position to know who organized the said Committee. No evidence was offered that petitioner personally directed any of its activities. The most that was proved was that he was occasionally in the Committee's office in conference with Dennett and that Dennett had called him on the telephone.

As will be noted, the testimony of husband and wife do not in all respects agree as to what petitioner is alleged to have told them. It is submitted that in addition to the apprent contradictions in their testimony, such testimony is not sufficient to establish that petitioner had any part in creating the War Debts Committee and much less that Dennett—in having material inserted in the Congressional Record, ordering reprints thereof, and mailing them out—was acting pursuant to the direction, or as the agent of petitioner.

But even if it were established that petitioner personally supervised and directed the obtaining of the reprints and mailing them out—and this has not been done—there is nothing whatever to show that in doing so he was acting as the agent of any foreign principal or that he obtained one dime therefor.

Such non-interventionist activities were certainly not the "business of registrant", within the terms of paragraph 11 of the supplemental registration statements which required him to give the nature of his business from which he earned his livelihood and not a detailed statement of activities constituting a temporary avocation.

Such non-interventionist activities of petitioner were no more his "business" or the "nature of his business" than were the activities of the interventionists their business. At most, these activities were merely temporary avocations, alike of both interventionists and non-interventionists, and not their business from which they earned their livelihoods. There was no requirement in paragraph 11 of the supplemental registration form that petitioner report his activities which were at best merely a side line and for himself.

The same may be said of the assistance given by petitioner to Senator Lundeen in the preparation of two or three addresses. The fact that petitioner may have obtained on his own initiative, or at the direction of Senator Lundeen, from the German Embassy certain data used in one or more of the addresses is of no importance in the absence of a showing that he was acting as the agent of a

foreign principal. The United States was then at peace with Germany; diplomatic relations were being maintained at the time between the two Governments; there was effective a Neutrality Act of Congress; and either a Senator or a private citizen was as free to obtain data from the German Embassy as he was to obtain same from the English Embassy. Truth is not subject to racial boundaries.

(6)

*Stage Play of Counsel for the Government.*

Counsel for petitioner requested the chief prosecuting attorney to furnish copies of the exhibits which he had introduced in evidence, consisting of reprints from the Congressional Record which had been mailed out by either Hill or the War Debts Committee.

The Government had placed Prescott Dennett on the witness stand but he had refused to answer practically all questions which were put to him by the court (Tr. 700-701). After this witness had been excused, Mr. Maloney requested that he be brought back for the purpose of having him identify some mail sacks "containing a lot of speeches." This stated purpose, but not the request, was made out of the hearing of the jury. The court refused the request (R. 161-162).

After Dennett had been excused, Hill had been placed back on the stand for further cross-examination. Several attendants, acting apparently under private instructions of Mr. Maloney, trooped into the court-room carrying numerous mail sacks (R. 162). Petitioner's counsel vigorously objected to the bringing of the mail sacks into the court room, but Mr. Maloney requested the court, in the presence of the jury, for permission to "make my offer of proof, through the witness, of these mail sacks." Mr. Maloney stated that the copies of the exhibits requested were in the mail sacks—but there was obviously no occasion to identify for the jury the mail sacks containing the reprints in order to deliver them to counsel for petitioner. The court ordered the sacks removed from the court-room (R. 162).

However, as a result of this stage play on the part of the chief prosecuting attorney, he got before the jury the several mail sacks, containing what appeared to be numerous reprints from the Congressional Record. This was obviously done for the purpose of creating the impression in the minds of the jury that petitioner was responsible for mailing out a vast number of reprints when the fact of the matter is that it was proven that he had connection with mailing out only one reprint of a speech and that connection was merely as an intermediary for Senator Lundeen.

(7)

*Attempt of Prosecuting Attorney to Create Sinister Aspects.*

In addition to the above related attempts to "smear" certain non-interventionist members of the Congress and to create the appearance of sinisterism by the friendship between them and petitioner, there was produced by the prosecution a clerk by the name of Gardner who was employed by the British censor in Bermuda. She testified that she had intercepted in the trans-Atlantic mails from the United States a large manila envelope which had been mailed in New York City on July 1, 1941, to a certain name in Lisbon, Portugal, identified by her as an alias for the German ambassador to Portugal. Inside the large envelope was a smaller one addressed to Dr. Hans Dieckhoff, Berlin, Germany, and inside of this smaller envelope were, of all things! clippings from the Congressional Record of speeches made by Senator Rush Holt of West Virginia (R. 206-210). There was no showing on or in the envelopes as to who had mailed them.

As indicated by the record, petitioner's counsel, upon objection of the chief prosecuting attorney, was denied the right to fully cross-examine this witness. A motion to strike her testimony was denied (R. 209).

Then the chief prosecuting attorney placed on the witness stand as his succeeding and last witness, a representative

of the Bureau of Investigation and qualified him as an expert on typewriting machines. Equipped with large charts, he proceeded in the presence of the jury to show why he thought that the typewriter used to address these envelopes was the same as the one which had been used to type a letter which petitioner had signed (Tr. 1087-1105).

This was all of the evidence that petitioner had anything to do with mailing the envelope in July, 1941, to Portugal, for transmission to Germany, but even if it were established that he did mail, or cause it to be mailed, the Neutrality Act was in effect; the United States was at peace with Germany; and there was no legal reason why a neutral could not communicate with persons in Germany. The envelopes, as stated, contained nothing more sinister than clippings from the Congressional Record!

**(8)**

*Petitioner denied right to show proof of his loyalty to the United States.*

As hereinbefore shown, petitioner had been publicly charged on February 6, 1942, by the chief prosecuting attorney, in the presence of press representatives and before Letts, J., with being a "sworn enemy of the United States" (R. 230-231) and the charges had been carried in the press, (R. 223) less than ten days before petitioner's trial commenced; the jury had heard this same prosecuting attorney viciously refer to petitioner as "using the Congressional Record and the franking privilege to divide us and literally to beat our brains out with his own clever propaganda" (R. 159, Tr. 202); as "our little proponent of better relations" (R. 199, Tr. 199); as operating propaganda "to divide us according to the plan of his Teutonic overlords in Berlin" (Tr. 201)—all without any evidence then or afterwards presented to the jury to establish any, much less a reasonable, basis for such statements.

However, counsel for petitioner determined to produce as a witness the United States Ambassador to Italy, who

had been Undersecretary of State, for the purpose of showing the loyalty of petitioner to his Government. Mr. William Phillips was produced and sworn, but upon objection of the chief prosecuting attorney, Mr. Phillips was not permitted to testify concerning the matter. The petitioner offered to prove:

> "* * * through the testimony of Ambassador Phillips that back in the year 1933, Mr. Viereck, upon his return from Europe, contacted the White House and stated that in his travels abroad he had procured some knowledge or information which he thought would be of importance or value to the United States Government, and that he wished to be able to transmit or impart same to the proper Government officials.
>
> "We further offer to prove that pursuant to such request on Mr. Viereck's part, he was referred by the House to the State Department, and there met and conferred with Mr. Phillips, who was acting Secretary of State at that time; that he had a conversation with Mr. Phillips; that he was thereafter referred by Mr. Phillips for further conversations to some office aids in the State Department, and that these conversations continued.
>
> "We offer this proof to show that in 1933 this man, who is here standing trial charged, among other things, with propaganda was, number 1, accepted by the American government as a person capable of imparting to them information about matters and information of importance, and, number 2, was so interested in the American Government that he was willing and anxious to impart such information.
>
> "This proof goes to show past conduct on the part of this defendant, and is offered on the question of intent in this indictment. (Tr. 1272)."

The tender of proof concerning these conferences was rejected by the trial court (R. 1274).

(9)

*Proof concerning wilful omission to fully reply to Paragraph 11 of the registration forms.*

No proof was offered by the prosecution showing or reasonably tending to show that petitioner had wilfully omitted to report the nature of his business or even that he wilfully omitted to report his activities as charged in the indictment. No proof was offered that petitioner engaged in any of these non-interventionist activities as the agent for any foreign principal or that petitioner received a dime from any foreign principal for engaging therein.

Apparently the prosecution relied upon the inferences that while petitioner was a registered agent for two, and for a part of the time for three foreign principals to perform specific duties for each, described in the contracts of employment filed with the State Department, and during some part of the time was engaged in non-interventionist activities, the contracts were a subterfuge. We submit that a man may not be convicted and heavy penalties meted out to him on any such basis.

Also, something was attempted by the prosecution to be made of the fact that petitioner was paid by his principals an aggregate sum of "more than $65,000" during the period of approximately 18 months that he was so employed (Gov. Br. in opposition to certiorari, p. 6-7). However, $10,000 of this sum was advanced under the Wirsing contract to pay the cost of publishing, advertising, and selling *One Hundred Families That Rule the Empire* and from the balance of some $55,000 the petitioner had to pay certain expenses, including assistants (R. 22, 43, 46, 51, 53). And taxes, the amount of such expenses does not clearly appear in the record.

Moreover, such earnings were not so much out of line with the earnings which it is reasonable to suppose that petitioner made as the author of some "best seller" books and as a contributor to such magazines as *Liberty* and *Saturday Evening Post*, in the latter of which his book *Spreading Germs of Hate* was first published serially. The

work for his foreign principals and his literary work could not be carried on at the same time, as petitioner pointed out in his letter to the German Library of Information (R. 48). Too, it is reasonable to assume that the continued absence of his name as author of magazine articles and books would considerably reduce the demand therefor and thus interfere with his sales of such books and articles.

No reasonable inference can be drawn from the amount of compensation received by the petitioner under his contracts of employment that a part of it was for carrying on his non-interventionist activities.

The fact that an envelope, containing clippings from the Congressional Record, was snared by the British censor in Bermuda on its way from New York City to Berlin via Portugal and the further fact that petitioner may have communicated with the German Embassy at the request, or instigation, of the late Senator Lundeen in an effort to obtain data for a speech or two by the latter, are not sufficient to establish that the petitioner was thus acting for any foreign principal, and/or receiving compensation therefor.

But petitioner was not willing to have his alleged wilful omission rest on the failure of the prosecution to establish, or attempt to establish the wilfullness of the charged omissions from the supplemental registration statements.

The petitioner tendered proof—which was rejected upon objections of the chief prosecuting attorney—that out of approximately 560-odd registration statements filed with the State Department by different agents of foreign principals, "over 500 of those registrants filed in the same form and in the same manner that this defendant did" (R. 179-187). In addition, the petitioner subpoenaed five registrants, "selected at random, who filed registration statements" and tendered their testimony as to what they understood Paragraph 11 of the registration form to require of them and how they answered it, but that tender of evidence was rejected (R. 188). Petitioner attempted to develop by the witness Price, who drew this registration form,

where he obtained the language for this paragraph 11 but the Court sustained objections to such testimony (Tr. 1382-1386).

Further, the record shows quite clearly that the petitioner was most anxious, even to the point of making himself somewhat of a nuisance, to comply with the law requiring registration of foreign agents. By letter of September 11, 1939 he notified the State Department of his contract with the Munich newspaper (R. 78); by letter of September 20, 1939, that department referred to a conference which petitioner had had in said department as early as March 13, 1939, or long before the contract was entered into, with respect to writing for foreign newspapers, and advised him to register on the forms enclosed for that purpose (R. 79-80); the form was executed on September 23, 1939, and receipt acknowledged in State Department letter of September 30, 1939 with request for an English translation of the contract, the copy filed being in the German language (R. 80-81); and this copy was furnished with petitioner's letter of October 2, 1939, receipt of which was acknowledged in State Department letter of October 9, 1939 (R. 82).

The State Department letter of September 30, 1939, referred to an inquiry by petitioner concerning the requirement for registration in event he became an employee of the German Library of Information and he was requested to furnish a copy of that contract in event it was consummated so that the said department could consider whether he would have to register therefor (R. 81). A copy of the contract was furnished with petitioner's letter of October 7, 1939 (R. 83-84) and petitioner was advised in a reply of October 12, 1939 that he would have to register as agent for the German Library of Information and that the copy of contract had been filed with the previous registration for the Munich newspaper (R. 84).

Apparently not content with all this—and showing his anxiety to comply with the law—petitioner wrote the State Department a further letter of October 13, 1939, inquiring whether there is "anything else I must do in the matter?

Must I report automatically every six months on the contracts in question, or will I have a reminder" (R. 85-86). Reply was made October 20, 1939 (R. 86). Six months thereafter, or April 19, 1940, petitioner executed before Notary Public Emil Morosini, Jr., who was his chief trial counsel in this case, the first of the supplemental registration statements and it was filed April 23, 1940 (R. 26-30). On October 24, 1940, petitioner executed before the same notary public his second supplemental registration statement and it was transmitted to the State Department with a letter from Cohalan & Morosini, Esquires, signed by Daniel F. Cohalan, Jr., who was petitioner's associate trial counsel (R. 30-35).

The second original registration statement, which was the agency for the publication of the Wirsing book was likewise executed before Mr. Morosini as notary public, was transmitted by his letter of April 24, 1941, to the State Department (R. 37-43) and was acknowledged in State Department letter of May 3, 1941 (R. 87-88).

It thus appears to be clear that one of the original, and at least two of the supplemental registration statements were executed and filed with advice of counsel—two of the three supplemental registration statements as to which violations were charged in two of the remaining three counts of the indictment.

It is difficult to understand from the record evidence what more petitioner could have done to show his concern in complying with the Registration Law and while it was not required to do so, at no time did the State Department suggest to petitioner or to his counsel that his registration forms were not in accordance with the said department's understanding of the requirements.[9]

In addition, and last but not least, the trial court excluded

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[9]Petitioner knew early in January and March 1941 that the Federal Bureau of Investigation was inquiring into his affairs (Tr. 442-445, 456-458). There was ample opportunity for him and his counsel to have changed his answers to paragraphs 11 of the supplemental registration statements subsequently filed had either believed that the answer theretofore given was not fully responsive.

petitioner's chief trial attorney from the case because he stated to the court, in the presence of the jury, as follows:

> "Now, if the court please, I think your honor has foreclosed us from a very important line of inquiry into this case. I think, in view of your Honor's rulings throughout the Government's testimony and throughout the defendant's testimony, I charge that your Honor is biased in favor of the Government and prejudiced against the defendant.
>
> "I say that this defendant has no alternative but to rest his case." (R. 118).

It was then about time for the noon recess and at the conclusion thereof, the court stated that it was his opinion that the remarks of petitioner's chief trial attorney "in submitting his case and resting were delivered for the purpose of encouraging this jury to believe that there is no use in proceeding further with the defense because the court wouldn't permit a defense to be put in, and if the court is correct in that, then the effort on the part of Mr. Morosini was to obstruct justice" (R. 120).

The prayers for instructions to the jury and objections to the Government's prayers as well as the closing argument to the jury on behalf of petitioner, had to be improvised by the associate trial counsel with such assistance as advisory, and present appellate counsel for petitioner could give.

## Statutes Involved.

The Statutes involved are the Act of June 8, 1938, as amended by the Act of August 7, 1939 (22 U. S. C. 601-606) and the superseding New Registration Act of April 29, 1942. These statutes are printed in full in the appendix to petitioner's brief in support of the petition for a writ of certiorari (pp. 63-82).

## SPECIFICATIONS OF ERRORS TO BE URGED.

1. Section 5 of the Act of June 8, 1938 (22 Stat. 615) (22 U. S. C. 615 is indefinite, uncertain, and fixes no definite standard of conduct, the violation of which constitutes a crime in the filing of supplemental registration statements, thereby infringing the petitioner's

rights under the Fifth and Sixth Articles of the Bill of Rights to the Constitution of the United States.

2. The indictment shows on its face that the alleged crime of omitting to state in answer to Paragraph 11 of the supplemental registration forms prescribed by the Secretary of State "as a part of his business and activities" the activities charged in Counts II, III and V of the indictment is not a failure to "Give a comprehensive statement of nature of business of registrant" as required by said paragraphs, constituting a wilful omission to state in supplemental registration statements material facts required to be stated in compliance with Section 3 of the Act of June 8, 1938, c. 327 (52 Stat. 631) as amended by Section 2 of the Act of August 7, 1939, c. 521 (53 Stat. 1244) (22 U. S. C. 611-616) or by the regulations issued by the Secretary of State.

3. The petitioner having answered Paragraphs 11 of the three supplemental registration forms requiring: "Give a comprehensive statement of nature of business of registrant" with the words "Author and Journalist" fairly and fully complied therewith.

4. The Paragraphs 11 of the three supplemental registration forms prescribed by the Secretary of State for use by all registrants requiring "Give a comprehensive statement of nature of business of registrant" were not in accordance with Section 3 of the Act of June 8, 1938, as amended by Section 2 of the Act of August 7, 1939, and therefore were void.

5: The court below erred in not reversing the trial court for:

(a) Admitting in evidence, over objections of petitioner, the book, *Spreading Germs of Hate* and in permitting the use thereafter made of it before the jury by the prosecuting attorney also over objections of the petitioner.

(b) Granting as instructions to the jury the prosecution's prayers Nos. 2A, 2 and 8 and in not granting petitioner's prayer No. 19, the latter sharply raising the issue that petitioner could not be convicted under the indictment unless the jury found that the activities, or some of them, charged in Counts II, III and V of the indictment were ones in which he engaged "as agent of a foreign principal during" the preceding six months' period

and that such omitted facts were material ones required to be reported by Section 3 of the Act of June 8, 1938, and the supplemental registration forms.

(c) Referring to, and quoting from a House of Representatives Committee report in his general charge to the jury with respect to the requirements placed by law on registrants of foreign principals in filing supplemental registration statements.

(d) Permitting in the presence of the jury the misconduct of the prosecuting attorney and in not instructing the jury to disregard such misconduct, particularly the inflammatory closing argument of such attorney for the Government.

6. There was no wilful intent shown to violate the law requiring registration of agents of foreign principals.

7. The court below erred in not reversing the sentence imposed by the trial court which added a further penalty of the costs of the trial to the penalties fixed in Section 5 of the Act of June 8, 1938, of a fine and/or imprisonment in the discretion of the court.

## SUMMARY OF ARGUMENT.

The petitioner urges that the penalty Section 5 of the Act of June 8, 1938, which was later superseded by Section 8 of the New Registration Act of April 29, 1942, is unconstitutional because of its indefiniteness and uncertainty in fixing a reasonable standard of conduct to be followed by registrants filing supplemental registration statements, the wilful violation of which constituted a crime. No such standard was fixed elsewhere in the Act of June 8, 1938, nor in the amending Act of August 7, 1939. If any proof of this uncertainty is required in addition to the language of the statute, it is found in the labored opinion of the United States Court of Appeals which undertook to rewrite the statute in order to uphold the conviction of the petitioner. Further proof is found in the rulings of the trial court in the admission of evidence on behalf of the prosecution and in the denial to petitioner of the right to introduce evidence to controvert the position taken by the prosecution.

It is also found in the wide difference of opinion between counsel for the Government and counsel for the petitioner as to what the statute actually means.

Petitioner claims that such indefiniteness and uncertainty and failure to fix any standards for supplemental registration statements were recognized by the Congress in the passage of the New Registration Act of April 29, 1942, wherein these defects were corrected.

The petitioner claims that he was indicted for one crime and tried for another, neither of which was within the terms of the 1938 Act as amended by the 1939 Act. The indictment being for an alleged wilful, unlawful, felonious, and knowingly omission to state certain detailed activities charged in the indictment and which activities were not required to be stated in the said Acts, nor in Paragraphs 11 of the supplemental registration forms, nor in the regulations issued by the Secretary of State. The trial was on the basis that petitioner was a propagandist, serving his "Teutonic overloads in Berlin" and striving to divide us and literally beat our brains out.

The petitioner could do no more than answer the said Paragraphs 11 of the supplemental registration forms in accordance with the usually accepted meaning of the words used by the Secretary of State therein and he did correctly answer the same. The activities of petitioner were not called for in said Paragraph 11 of said forms and the non-interventionist activities of petitioner were engaged in for himself, not for any foreign principal, and not for hire. Had it been the intention of the 1938 and 1939 law to require petitioner to report his activities, whether on his own behalf or for a foreign principal, such Acts would have so specified, as does the New Registration Act of 1942.

The errors of the trial court in the admission of evidence, instructions to the jury, and the misconduct of the chief prosecuting attorney were many and an attempt has been made in the Statement of the Case to summarize them. At the very least, these errors alone are undoubtedly such as to entitle the petitioner to a reversal and a new trial.

## ARGUMENT.

### I.

**Section 5 of the Act of June 8, 1938 (52 Stat. 615) (22 U. S. C. 615), the Penal Provision of the Law, is Indefinite, Uncertain, and Fixes no Definite Standard of Conduct, the Violation of Which Constitutes a Crime in the Filing of Supplemental Registration Statements, and the Petitioner's Conviction and Sentence Thereunder Infringes His Rights Under the Fifth and Sixth Articles in the Bill of Rights of the Constitution of the United States.**

Section 5 of the Act of June 8, 1938 (22 U. S. C. 615), is as follows:

> "Any person who wilfully fails to file any statement required to be filed under this Act, *or in complying with the provisions of this Act, makes a false statement of a material fact, or wilfully omits to state any material fact required to be stated therein shall*, on conviction thereof, be punished by a fine of not more than $1,000 or imprisonment for not more than two years, or both." (Italics supplied.)

As petitioner filed both the required original and supplemental registration statements and as he is not charged with making any false statements therein, the only material part of this section is a part of the italicized language, to wit: "in complying with the provisions of this Act . . . wilfully omits to state any material fact required to be stated therein." What is a material fact required to be stated in complying with the provisions of the Act is certainly not stated or defined in this section!

Since the demurrer was sustained as to Counts I and IV of the indictment pertaining to the two orignal registration statements for the three foreign principals and petitioner was tried and convicted under Counts II, III and V pertaining to the three supplemental registration statements, we

must turn to Section 2 of the 1939 Act amending Section 3 of the 1938 Act requiring the filing of supplemental registration statements, in pertinent part, as follows:

> " 'Sec. 3. Every person who has filed a registration statement required by Section 2 shall, within thirty days after the expiration of each period of six months succeeding the first filing, file with the Secretary a statement, under oath, on a form prescribed by the Secretary, which shall set forth with respect to such preceding six months' period—
>
> " '(a) Such facts as may be necessary to make the information required under Section 2 hereof accurate and current with respect to such period;
>
> " '(b) The amount and form of compensation received by such person for acting as agent for a foreign principal which has been received during such six months' period either directly or indirectly from any foreign principal; and
>
> " '(c) A statement containing such details required under this Act as the Secretary shall fix, of the activities of such person as agent of a foreign principal during such six months' period."

This is the only section of the statute which provides for the filing of supplemental registration statements and which provides for the contents thereof. It is well to note that Section 2 of the 1938 Act was not amended by the 1939 Act. This unamended Section 2 of the 1938 Act specifically provides as to the contents of the original registration statements and by reason of the demurrer being sustained as to the Counts I and IV, pertaining to such original registration statements, they are not before this Court and peitioner is not now answerable as to them. It must thus be taken for the purpose of this case that the orignal registration statements fully complied with the specific directions of the Congress in the said unamended Section 2 of the Act.

As hereinbefore stated, the suplemental registration statements were identical in their requirements contained in 19 separate paragraphs or questions, exeept as to para-

graph 15 thereof which differed slightly as between the original and supplemental registration forms, pertaining to the matter of compensation received by the registrant. This difference is due to the difference between the requirements in the unamended Section 2 (e) of the 1938 Act which required the registrant in his original registration statement to state:

> "The compensation to be paid, if any, and the form and time of payment under such contract"

while the amended Section 3 (b) of the 1938 Act stated the requirements above quoted for the supplemental registration statements.

This slight difference may be laid aside as immaterial for present purposes. It seems to be agreed that petitioner met all of the requirements of all of the 19 paragraphs of each of the three supplemental registration forms except Paragraph 11, which he was charged in Counts II, III and V of the indictment as violating. Also, as hereinbefore quoted, this Paragraph 19 of the supplemental registration forms was identical with the same numbered paragraph in the original registration form in containing the requirement that the supplemental registrant:

> "Give a comprehensive statement of nature of business of registrant."

The answer to that requirement was "Author and Journalist."

Most certainly the above quoted Amended Section 3 of the 1938 Act is as silent as the above quoted Section 5 of the Act as to what shall constitute a "material" fact, the omission of which in the supplemental registration statement shall constitute a crime punishable with a heavy fine and imprisonment—meted out to the petitioner upon his conviction—for wilfully omitting to state them in filing his supplemental registration statements.

We repeat that petitioner was not charged nor convicted of omitting to state his answers to the specific requirements

set forth in the other 18 paragraphs of the supplemental registration form—and these were the requirements which had been prescribed in the unamended Section 2 of the Act. The supplemental registrant was required in the Amended Section 3 to furnish current information as to the preceding six months' period plus the other specific requirement stated in the amended Section 3 (b) of the 1938 Act for which paragraph 15 in the suplementad registration statement was formed.

The only possible basis for paragraph 11 in the supplemental registration forms is the above quoted amended Section 3 (e) of the 1938 Act and this was conceded by the court below—which tried to make it fit the alleged crime by judicially rewriting it. However, the Government, apparently not persuaded that the Court could do this, is now attempting to argue that a basis for such paragraph may be found in the general purpose of the 1938 Act as amended (Gov. Br. p. 21).

But that amended Section 3 (c) is specific in its terms and is controlling under familiar rules of statutory interpretation over any general terms of the statute (Post, R. 59). Also, unlike the amended Section 3 (b), pertaining to the supplemental registration forms, and unlike the unamended Section 2 (a) to (g) inclusive, pertaining to the contents of the original registration forms, Section 3 (c) makes no specific requirement of the supplemental registrant. It is not even a requirement sub-section of the statute. It is merely an authorization sub-section. It authorizes the Secretary of State, in his discretion, to fix a requirement in the supplemental registration form that there may be reported the activities of a registrant as agent of a foreign principal

concerning the details which he was required under this Act to report.[9]

This Section 3 (c) did not fix the material facts to be reported. It left to the discretion of the Secretary of State to require the reporting of the activities in connection with the details required under the Act of persons as agents of foreign principals. The authorization did not extend to fixing any activities which the registrant should report, but specifically limited that authorization to asking for the activities of the details which the Act itself required to be reported by the registrants as agents of foreign principals.

This Section 3 (c) is indefinite and uncertain because it left the matter to the Secretary and it was made more so

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[9]Of course, it can not be conceded that the appellant is guilty simply because he may not have complied with paragraph 11 of the registration form as charged in the indictment. The Original Act as amended did not specifically provide that a registrant would incur the penalties of Section 5 thereof for violation of any form or regulations issued by the Secretary of State as charged in the indictment. Aside from the fact that the regulations and forms are void to the extent that they exceed the terms of the statute (See *United States* v. *Symonds*, 120 U. S. 49; *United States* v. *Garlinger*, 169 U. S. 316), a person may not be punished criminally for violation of a regulation or form unless a statute specifically so provides. *United States* v. *George*, 228 U. S. 14; *United States* v. *Eaton*, 144 U. S. 677; *United States* v. *United Verde Copper Company*, 196 U. S. 207; *United States* v. *Standard Brewery*, 251 U. S. 210; *United States* v. *11,150 lbs. of Butter*, 195 Fed. 657; *Keane* v. *United States*, 272 Fed. 577; *United States* v. *Birdsall*, 206 Fed. 818; *United States* v. *Sandefuhr*, 145 Fed. 49; *United States* v. *Dodson*, 268 Fed. 397; *United States* v. *Ballard*, 12 Fed. Supp. 321. The rule in criminal cases is summarized in the latter case as follows:

> "The crime must be created by the Act of Congress, alone, for the public are not required to look beyond the act in their endeavor to ascertain what is criminal and the discretion of fixing what facts import criminality is is exclusively that of the law-maker as distinguished from the executive. The effect of departmental regulations, not ratified by act of Congress, is confided to civil matters and cannot be made the predicate of criminal offenses." (Citations.)

when the Secretary did not even attempt to ask for details of activities of the supplemental registrant concerning the details required to be reported under the Act—either for himself or for his foreign principal or for both—but instead the said Secretary fixed that such supplemental registrants should:

> "Give a comprehensive statement of nature of business of registrant."

The important word in this Paragraph 11 is "business." The word has been defined in the quotation elsewhere in this brief from an authority on the English language (Ante, Op. 7-8) to mean, in substance, that which requires the time and thought of a person and at which he earns his livelihood.

The identical paragraphs 11 in the original registration forms undoubtedly have the same meaning as they have in the supplemental registration forms and vice versa. The same answer was given in each instance by the petitioner; "Author and Journalist" and the contracts of employment of petitioner by the two foreign principals, for which these three supplemental registration statements were filed, showed by their terms that such was the work or *business* which petitioner performed for them.

The Secretary of State had no authority to issue forms except as that authority is found in this Act as amended and that authority, however general it may have been, as to other parts of the Act, was limited by Section 3 (c) to fixing for this requirement only what the said Section authorized and nothing more. He did comply with Section 3 (b). He did not comply with the said Section 3 (c). Nowhere in Section 3 (c) is he authorized to ask for the nature of the business of the registrant, whether for the registrant himself or for his foreign principal or both. The whole of the English language was available to the Congress had it intended to grant such authority to the Secretary or to state such requirement itself—and if the authority had been granted to this Secretary to do so, the

whole of the English language was available to him for that purpose. The Congress has used such language in Section 2 of the New Act of April 29, 1942.

In an effort to make subsection 3 (c) of the Act and Paragraph 11 of the supplemental registration form require that the registrant must report all of his activities whether or not performed as agent for his foreign principals, the court below also relied in its opinion upon paragraph 12 of Chapter IV of the regulations issued by the Secretary of State, which provides;

> "Agents of foreign principals who engage, whether or not on behalf of their foreign principal, in activities not included among the exceptions set forth in the Act and regulations shall be considered subject to the requirement of registration" (Pet. Br. 92).

This regulation does not require, or even advise an agent of a foreign principal that as such agent he must report any or all of his activities whether or not performed "as agent for a foreign principal," using the language of Section 3 (c) of the Act. The regulation simply and clearly provides that if a person is such an agent, and performing such activities for a foreign principal as are not excepted under the proviso to Section I of the Act and the regulations, that agent must register. The petitioner did register. What he must state in answer to Paragraph 11 of the Supplemental form; what "material facts" he must report in answer to that paragraph 11, are simply not stated in this paragraph of the regulation, nor elsewhere in either the regulations or the Amended Section 3 of the Act.

Moreover, the supplemental registrant was required to use a form prescribed by the Secretary in submitting his registration and specifically in Section 3 (c) of the Act he had to answer what the Secretary had fixed in the supplemental registration form. He could not safely disregard the paragraphs of the said form and follow the regulations nor could he safely disregard the form even though he might think it did not track the statute.

If the said Section 3 (c) be as uncertain as the court below seemed to think, it can not be judicially rewritten, as the court did do, as shown by the following comparison:

| SUBSECTION 3 (c) | COURT'S REWRITE |
|---|---|
| "A statement concerning such detail, required under this Act as the Secretary shall fix, of the activities of such person as agent of a foreign principal for such six months' period." | "We interpret the provision as follows: a statement of the activities of such person (an agent of a foreign principal) during such six months' period" (R 324). |

A criminal statute must be applied as it is found. It cannot be rewritten under the guise of "interpretation" as the court below has done. *United States* v. *George*, 228 U. S. 14, 22; *Bathgate et al* v. *United States* 220 U. S. 220, 225; *Falsulo* v. *United States*, 272 U. S. 620; *United States* v. *Chase*, 135 U. S. 255. See also Edward Livingston's statement (Works, Chase's ed. 1873, vol. 1, pp. 12,170) in reference to the English doctrine of constructive crimes and the entrapment of innocent persons by vague penal laws through the medium of judicial interpretation that:

> "This dreadful list (of offenses) was increased by the legislation of the judge, who declared acts which were not criminal under the letter of the law, to be punished by virtue of its spirit. The statute gave the text, and the tribunal wrote the commentary in letters of blood; and extended its penalties by the creation of constructive offenses * * * What the law forbids, is an offense; but the law cannot forbid without being perfectly intelligible * * * An ambiguous penal law is no law, and judicial decisions cannot explain it without usurping authority that does not belong to them."

Government counsel do not appear to be greatly concerned with this age-old principle of Anglo-American law. In their brief in opposition to the application for a writ of certiorari, they argue, (pp. 17-26) that it is unnecessary to rely upon Section 3 (c) as the basis for affording authority

to the Secretary to require the disclosure of all political activity of the foreign paid propagandist, as that authority could be drawn from the general purposes of the statute as a whole. In making such argument the Government ignores the elemental rule of statutory interpretation that the specific terms of a statute control over any general language or general purpose thereof. Also, the obvious fact that such an argument is incorrect is established by the further fact that in the New Act of April 29, 1942, Congress specifically provided for such full disclosure by an agent of a foreign principal of all his activities, whether or not for his foreign principal, thus doing by statute what the Government has thus far succeeded in persuading the courts below to do by interpretation. They now seek to persuade this court to sustain that interpretation—even in the face of the fact that Congress has entirely rewritten, rearranged and expanded the statute to make it accomplish what the Government seeks by interpretation to make the prior law do.

If Section 3 (c) has to be judicially rewritten as the court below did attempt to do in order to sustain the conviction and sentence of the petitioner and if Government counsel in this Court must fall back on what they contend are the general purposes of the Act as amended—and which we as strongly contend were not its *expressed* general purposes—the statute as so interpreted is most clearly in violation of the Fifth and Sixth Articles to the Bill of Rights to the Constitution—the maintenance of which inviolate is of far more importance to the people than that petitioner should go to the penitentiary and pay a heavy fine.

*United Staes* v. *Cohen Grocery Company*, 255 U.S. 81.
*Lanzetta* v. *New Jersey*, 306 U.S. 451.
*Gorin* v. *United States*, 312 U.S. 19.
*United States* v. *Wurzbach*, 280 U.S. 396.
*Church of Holy Trinity* v. *United States*, 143 U. S. 226.
*Livingston's Works*, above cited.

There is no question here of a statute "receiving administrative or judicial refinement before it is applied," as suggested by the Government (Br. P. 26). The much referred to Article 12 of the Regulations shows on its face, as above stated, that it does not attempt to advise a registrant what he must include in a supplemental registration form. It merely advises him that he must register if he is the agent of a foreign principal and engages in non-excepted activities. The language is so plain that petitioner does not understand why it is so strenuously insisted that it requires him to register and report his activities, whether or not for his foreign principal. When he registers he must use the form which the Secretary has prescribed and answer the Paragraphs thereof as they are found—not as the registrant may think they should be. There was no judicial refinement because both of the courts below read into Section 3 something that is not there.

The fact that the 1938 Act as amended would not work satisfactorily under such interpretation as petitioner insists should be given to it, is of no concern to a court called upon to determine the constitutional and legal rights of a citizen. Congress makes the laws in this country as this Court pointed out in *United States* v. *Wiltberger*, 5 Wheat. 76, 95:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislative, not the court, which is to define a crime and ordain its punishment."

Also, in *Harrison* v. *Vose*, 9 Howard, 372, 378 that:

> "In the construction of a penal statute, it is settled, also, that all reasonable doubts concerning its meaning ought to operate in favor of respondent."

Moreover, the final and conclusive answer is that Congress itself realized the defects in the 1938 Act as amended in 1939 and after experience with its operation, the Congress enacted an entirely new and different 1942 Act to more fully and comprehensively cover the activities of agents for foreign principals.

Bearing in mind the extreme concern of this petitioner to fully comply with the Registration Act of 1938 as amended —a concern which is set forth at some length in the Statement of the Case (pp. 32-33) is it possible to believe that this petitioner would not have reported all of his activities for himself if the 1942 Act has been law or if he had known that that was what Paragraph 11 of the supplemental registration forms intended, as now so vigorously urged by the Government?

There was certainly no reason why he should not have reported his activities as a non-interventionist on his own behalf. They were far from secret. He went and came as he saw fit. While it is not shown by this record, except indirectly, it is a fact that newspapers and a radio commentator were frequently referring to this petitioner's activities as a non-interventionist, working with various others in an attempt to keep this Nation neutral as provided in the Neutrality Act of 1939.

Upon this point, petitioner insists that the applicable parts of the 1938 Act as amended, for the filing of supplemental registration statements and punishemnt for any wilful failure to report all material facts required by the Act to be reported, are void as being in conflict with the Fifth and Sixth Articles of the Bill of Rights. Petitioner further insists that the uncertain, and indefinite terms of the said Act as amended and its failure to prescribe any definite standards of conduct, the violation of which constituted a crime were recognized and corrected by the Congress in the Act of 1942, thus showing that the Congress itself recognized that the prior acts were defective to that extent.

## II.

**The Indictment Shows on Its Face That Petitioner's Alleged Crime of Omitting to State in Answer to Paragraphs 11 of the Supplemental Registration Forms Prescribed by the Secretary of State "As a Part of His Business and Activities" the Activities Charged in Counts II, III and V of the Indictment is Not a Failure to "Give a Comprehensive Statement of the Nature of Business of Registrant" as Required by Said Paragraphs 11 and Does Not Constitute a Wilful Omission to State Material Facts in the Supplemental Registration Forms in Compliance with Section 3 of the Act of June 8, 1938 as Amended by the Act of August 7, 1939 (22 U. S. C. 611-616) or With the Regulations Issued by the Secretary of State. The Petitioner fairly and Fully Complied Therewith When He Answered "Author and Journalist."**

**The Petitioner Was Indicted for One Alleged Crime and Tried for Another, Neither of Which was Within the Terms of the 1938 Act as Amended by the 1939 Act.**

**(a).**

**Tried and convicted as a foreign propagandist**

During the entire period covered by these three remaining counts of the indictment on which petitioner was tried for wilfully omitting to state "as part of his business and activities" certain activities named in the indictment—and to only a part of which the evidence was directed—which were wholly activities having for their purpose the keeping the United States a neutral in the war then and now raging in Europe, Asia and Africa—there was in effect the Neutrality Act of 1939 having a similar purpose.

During a considerable part of this period, extending from the nominating conventions in the early summer of 1940 until after the election in November 1940, each of the candidates of the two principal political parties were likewise expressing their neutral position as between the warring Governments.

The petitioner, as a professed and confessed non-interventionist, was merely cooperating with other non-interventionists in opposing the efforts of interventionists to bring about repeal of the Neutrality Act of 1939 and involve the United Staes in the war on the side of one group of the belligerents.

The hereinbefore cited statements and arguments of the chief prosecuting attorney—collected in the record but more fully shown by the transcript of the proceedings of the trial—demonstrate that he, at least, considered any of the non-interventionists—particularly the late Senator Lundeen, Senator Holt, Congressmen Fish and Day, and the petitioner—as enemies of their country.[10] No other possible interpretation can be placed on his characterization of petitioner as "a sworn enemy of this country," as serving his "Teutonic overlords in Berlin;" as endeavoring to divide us and literally beat our brains out; and his impassioned closing appeal to the jury that since this was war, terrible, cruel war, he was calling upon the jury as a representative of his Government to do their duty and protect all of us, as the defenders on Bataan Peninsula were then doing.

No other possible interpretation can be placed on his reference to the late Senator Lundeen as "possibly more fool than rogue; certainly something of both," and as having been an extortionist because he entered into an agreement with some of his office help to pay a part of their salaries into an office expense account. He did not call Congressman Day as a witness but he did call Congressman Fish and petitioner submits that there seldom, if ever, has

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[10]Washington, in his Farewell Address, anticipated that such a state of affairs might come about. He said:

> "* * * Excessive partiality for one foreign nation and excessive dislike of another cause those whom they actuate to see danger only on one side, and serve to veil and even second the arts of influence on the other. Real patriots who may resist the intrigues of the favorite are liable to become suspected and odious, while its tools and dupes usurp the applause and confidence of the people to surrender their interests."

been such a scene in an American court-room as that staged by this chief prosecuting attorney in his effort to heckle and impung the patriotism of a member of Congress—patriotism and bravery which that member of Congress had shown on the field of battle and recognized by the decorations bestowed upon him—and last but not least, which his people recognized and appreciated when, following such esisode, they overwhelmingly reelected him to his seat in the House of Represetatives!

This brief has heretofore referred to this prosecutor's reference to Senator Holt and to ex-Congressman O'Connor (Ante, pp 19-20). The trial court was requested in a formal motion to restrain this prosecutor from giving interviews, releases or holding press conferences with representatives of the press concerning this case before, after and during the trial of the case (R 229) and that motion not having been granted, a formal complaint in a letter of February 11, 1942, was lodged with the Attorney General against the activities of this prosecutor in these respects (R 230-232).

This letter and certain news stories in the Washington newspapers were brought to the attention of the trial court in a renewal of the motion for a change of venue but the motion was denied in its entirety (R 228-236).

All of this and the hereinbefore referred to introduction in evidence of petitioner's book, *Spreading Germs of Hate*, published approximately ten years before the alleged crimes and concerning events a quarter of a century prior thereto, [11]as well as the reading of extracts therefrom to the

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[11]There was then, and there is now, nothing to show what prior acts, in 1914 to April 1917, are similar or of a kindred character to what acts in 1939-1941 charged in the indictment. Such a showing is necessary. *Partridge* v. *United States*, 39 App. D. C. 571; 46 Harvard Law Review 954-985; 50 Harvard Law Review, 998-1037; Crowe & Camp, 11 Encyclopedia on Evidence (1905) 627-642. The book was not relevant.

2 Starkie, *Evidence*, 381: "No new matter foreign to the issue joined is admissible in evidence." Foster, *Common Law*, 246: "The rule rejecting all manner of evidence in criminal

jury were apparently calculated to, and did, result in the trial of petitioner for being an alleged propagandist in the service of his "Teutonic overlords in Berlin" and in league with other men of alleged questionable patriotism having the purpose, at least on the part of petitioner, to "divide us and literally beat our brains out" (R. 159).

There can be no doubt that petitioner was tried for being a propagandist, with the inference and without any proof whatever to support it that he was doing this for his "Teutonic overlords in Berlin," and as a "traitor to his country." The chief prosecuting attorney was formally charged by petitioner's trial counsel and the charge was not denied, with being seen in conference with a particular reporter for one of the Washington newspapers[12] and this prose-

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prosecutions that is foreign to the point in issue is founded on sound sense and common justice."

*United States* v. *Corwin*, 129 U. S. 381, 386: "Incompetent and irrelevant evidence cannot be converted into competent and relevant evidence simply because it is contained in an official document." The book was not evidence of similar acts.

*Johnston* v. *Jones*, 1 Black U. S. 209.

*United States* v. *Jones*, 8 Peters 399.

*Albany & R. Iron & Steel Company* v. *Lundberg*, 121 U. S. 451.

*Delaware, L. & W. R. Company* v. *Converse*, 139 U. S. 469. Underhill, *Criminal Evidence* (3rd Ed. 1933) pp. 187-211. The book not having been a previous crime similar to that charged in the indictment and not having been shown to represent the intent of appellant in 1939-1941 was not relevant and admissible under any theory of the case. See also 2 Wigmore *On Evidence*, (2nd Ed. 1923) 696-717, and Camp & Crowe, *The Encyclopedia of Evidence*, (1905), (pp. 627-642) for full discussion of rules. *Anderson* v. *United States*, 170 U. S. 481.

Moreover, the trial court failed to instruct the jury as to the probative extent of the book and such failure in itself constitutes reversible error.

*Williamson* v. *United States*, 207 U. S. 425; *Shreve* v. *United States*, 103 Fed. 2d, 796; *Dysart* v. *United States*, 270 Fed. 77; and *Tedesco* v. *United States*, 118 Fed. (2d) 737.

[12]Supposed leaks from the grand jury to this reporter had become such that the matter was discussed by Congressman Hoffman on the floor of the House of Representatives (*Congressional Record*, April 20, 1942, p. 3675) as follows:

> "Getting back now to this question of secrecy of the proceedings before the grand jury. In this article in the

cuting attorney unquestionably did hold aloft to the jury in his arguments a copy of the petitioner's book on propaganda, *Spreading Germs of Hate*, with the statement that it was the text of the government and the epitaph, in one instance, and the obituary, in the other, of the petitioner. This prosecutor unquestionably did refer, in the presence of the jury, to the "nefarious activities" carried on by the petitioner "in an apartment at 305 Riverside Drive, New York City, where he lived" (R. 157).

This prosecutor did unquestionably state to the jury that "We are trying defendant Viereck on a charge of propagandizing" (R. 154) and it is equally unquestionable that Counts II, III and V of the indictment charged wilful omission of material facts concerning a part of petitioner's

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Washington Post the reporter stated that the list of those who had received copies of the speech 'Don't Haul Down the Stars and Stripes,' included at least a dozen. The article then gave the names of nine persons, one in Kansas City; one at Wichita, Kansas; one in Cleveland; one in Washington; one in Hempstead, L. I.; one in Lincoln, Nebr.; another in Detroit, Mich.; another in Brooklyn, N. Y.; another in San Francisco.

"Certainly the reporter did not get those names from me, nor did he get them from anyone in my office. Where did he get them? Does he claim that he traveled to those various cities, interviewed the recipients? And how did he know who they were?

"Certainly, Mr. Maloney, as special prosecutor did not give out that information. Is it possible that Mr. Maloney, the individual, inadvertently, unintentionally, let it leak out?

"I would like the privilege of cross-examining that reporter under oath. I would like the privilege of having him called before a committee of the House and then be given the opportunity to inquire into his activities.

"Where did he get that information? Certainly he did not get it from any member of the grand jury. No one on that grand jury would violate his oath about disclosing information of that kind. Where did the gentleman get it? Let Mr. Maloney answer, if he knows. Let his investigators answer. Let those who guard the secrecy of the grand jury room make answer. There is the list of seven or more names who obtained copies of that speech. From whence came that information?"

business and activities from the supplemental registration statements and not with propagandizing. Authorities on such misconduct are collected in a footnote.[13] Further,

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[13]"The United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense" in *Berger* v. *United States*, 295 U. S. 78, 84. The court there said among other things, that:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

It is true, as the court below pointed out, that petitioner's associate trial counsel did not immediately object to the inflammatory closing argument of the prosecuting attorney to the jury but he did so when there remained ample time and opportunity for the court to have properly instructed the jury against such an argument as it was held should have been done in *Hall* v. *United States*, 150 U. S. 76, 82, because of an improper argument of the prosecuting officer of the United States which constituted "a breach of professional and official duty." See also the opinion in *Frisby* v. *United States*, 35 App. D. C. 513. As a matter of fact, the court having removed petitioner's chief trial counsel from the case should have stopped such an argument on its own motion. *Glasser* v. *United States*, 313 U. S. 551, reversed 86 U. S. Law ed. 405.

This is not the first time that such a charge as this of misconduct has been made against prosecutor Maloney.

The United States Circuit Court of Appeals for the Second Circuit has his misconduct before it in *United States* v. *Buckner*, 108 Fed. (2d) 921, and in *United States* v. *Dubrin*, 93 Fed. (2d) 499, at pages 505 to 506. The *Buckner* case was a prosecution for use of the mails to defraud. The court there said, at page 928, with respect to his conduct:

> *"The trial conduct of the Assistant United States Attorney.* All defendants lay great stress upon the mis-

it is an unquestionable fact that neither the Act of 1938 as amended by the Act of 1939 nor the New Act of 1942 made "propaganda", as such, a crime. Only the latter Act required the reporting of propaganda and its labelling as such (See Sec. 4 thereof, Pet. Br. 77-78).

The general charge of the trial court to the jury, which was excepted to by petitioner (R. R. 22-26) could have had no other effect than to impress on the minds of the jury that they were called upon to determine the guilt or innocence of the petitioner as a propagandist rather than his wilful omission of material facts in answer to the requirements of Paragraphs 11 of the three supplemental registration statements.

Finally, the granting of the prosecution's prayers 2A, 2 and 8 (R. 101-114) over the objections of petitioner and the denial of petitioner's prayer No. 19 (R. 96-101) sealed petitioner's fate with the jury because all that it had to do to convict was to find that petitioner engaged in some of the activities charged in the indictment without being under the necessity of finding that in engaging in them the petitioner acted as the agent of any foreign principal or that he en-

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conduct of the Assistant United States Attorney. They complain of the spectacular and prejudicial manner in which he managed the trial as a whole, and also attack particular instances of misbehavior in examination of witnesses and in colloquies with opposing counsel. Even from the printed record we can see the vigor with which the prosecutor pressed the case, vigor which at times went beyond the canons of decorum and dignity which an officer of the United States should observe. The prosecutor was not averse to indulging his talent for spectacle: Chorus girls and movie stars were paraded to the stand to prove only minor portions of the Government's case. Theatrical demonstrations, however diverting to the spectators, and jury, have no place in a United States court room. Nor was the intemperance of several attacks made upon defendants and their counsel in keeping with the Supreme Court's reminder that the prosecutor is to regard himself as 'the servant of the law,' *Berger* v. *United States*, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. We cannot approve such conduct."

gaged in them for hire which hire made them a part of his business from which he derived a part of his livelihood, or at least some income. We repeat that no evidence whatever was even offered to prove that in engaging in these non-interventionist activities the petitioner acted as the agent of any foreign principal or that he derived one dime of income therefrom or that he wilfully failed to report them.

Petitioner believes this to have been wholly wrong and that in making a fight for his constitutional liberties he is waging the cause of all others in minorities who may take the losing side of any great argument and who may find themselves prosecuted by a Government in which the winning side of the argument is predominant.

(b).

**The Charge in the Indictment was no Crime under the Statute.**

The charge in the remaining three Counts II, III and V of the indictment is that petitioner wilfully omitted to state in answer to Paragraphs 11 of the three supplemental registration statements certain activities charged therein. The court below summarized in its opinion that the evidence related to the charge that petitioner failed to report (1) That he had been instrumental in having mailed out a large number of reprints from the Congressional Record which were read into the transcript of the proceedings in the trial court; (2) That he made certain loans to Flanders Hall, Inc., which printed a number of booklets, anti-British in character, from manuscripts furnished by petitioner and some of which were plagiarisms of booklets published in Germany; (3) That petitioner assisted Senator Lundeen in writing three speeches which were not anti-American in character; and (4) That petitioner was connected with certain War Debts Committees.

The transcript of the proceedings in the court below may be read from beginning to end—and by far the principal part of it consists of the testimony, etc., of the prosecution

and we submit that (1) There is no proof that the petitioner engaged in any activities in any degree hostile to the United States; (2) That the reprints of the addresses, all non-interventionist in character, which were mailed out contained nothing whatever disloyal to our country and that the evidence fairly connects the petitioner with the mailing out of only one of them; (3) That the three addresses delivered by the late Senator Lundeen and which it is claimed that the petitioner assisted him in preparing were not anti-American in any respect whatsoever; and (4) That petitioner's connection with Flanders Hall, Inc., was nothing more than an ill-advised business venture of an author and journalist with so little knowledge of business that he lost more than half of his loans to the said company.

None of these activities was made a crime under the 1938 Act as amended. None of these activities could be fairly stated to be the "business" of petitioner. None of them was anti-American in character or sought the ends referred to in the trial court's general charge to the jury. (R. 92-96.) Petitioner not only admittedly lost a large part of the Flanders Hall, Inc., loans, but it is not even suggested in the proof, much less proven, that petitioner made a single dime in any of these activities. It is likewise not proven that he was acting as the agent of any foreign principal in his efforts to show that the United States should not enter the war at all, much less on the side of England which some believe to have been imperialistic in dealing with South Africa, Egypt, and India.

Certainly, as a neutral nation, our citizens—and petitioner had been one for many years—could legitimately resort to these arguments in attempting to convince fellow-Americans that they should not espouse the English cause in the war. He had as much right to make that argument as the interventionist had to make a contrary one. After all, in a Republican form of government, the people are entitled to the pros and cons of any question before they are required to decide.

**(c).**

**When petitioner answered "Author and Journalist" he fully and fairly answered the requirement of Paragraph 11 of the supplemental registration form that he give a "Comprehensive statement of the nature of business of registrant."**

It fairly appears in the record that petitioner had been an author and journalist all of his mature life. (168-177.) The prosecution conceded that petitioner had been a prolific writer of books and magazine articles. (R. 175.) It was precisely because of his writing ability that he was employed by both the Munich newspaper and by the German Library of Information as proven by the terms of the respective contracts. (24-25, 25-26, 48-50.)

When called upon to state the "nature of business of registrant" in answer to Paragraph 11 of the original and supplemental registration forms, petitioner answered "Author and Journalist"—the answer being by the use of such words in the original registration form and by the use of the word "Same" in the supplemental forms in accordance with the directions for preparing such supplemental registration statements. (R. 27, 30, 44.)

According to the definition of the word "business," hereinbefore quoted in this brief from Crabb's *English Synonyms* (*ante*, pp. 7-8) business occupies all a person's thoughts as well as his time and powers; requires diligent prosecution for success in life; and the exercise of one's knowledge and experience for the purpose of gain. Petitioner was not called upon to give a detailed statement of his business but a comprehensive statement as to the nature thereof and certainly the words "author and journalist" were comprehensive. To a generic requirement, petitioner made a generic answer.

The general purpose of the 1938 Act as amended may not be invoked to supersede the specific requirements of the amended Section 3 of the Act which was exclusively confined to supplemental registration statements and their con-

tents. The Act itself in Sections 3(a) and (b) stated specific requirements but Section 3(c) left to the Secretary of State the responsibility for fixing the requirement. He did fix it in Paragraph 11 and it did not call for "activities."

It is repeated that the specific requirements of Section 3 of the Amended Act of 1938, and of Paragraph 11 of the supplemental registration forms are controlling under well settled rules of interpretation, over the general terms of the statute and Paragraph 12 of the Regulations.

*Child Labor Cases*, 259 U. S. 20.
*United States* v. *Chase*, 135 U. S. 260.
*The Paulina* v. *United States*, 7 Cranch. 52.
*Smith* v. *Townsend*, 148 U. S. 490.
*Townsend* v. *Little*, 109 U. S. 504.
*Kepner* v. *United States*, 195 U. S. 100.

This applicable rule is in addition to the rule hereinbefore stated that penal laws must be construed most strongly in favor of the accused.

The disregard of these rules of statutory interpretation is one of the reasons why the general instructions of the trial court to the jury (R. 92-96) were so prejudicial to the petitioner in their devastating effect, particularly when coupled with the allowance of the prosecution's prayers 2A, 2 and 8 as instructions to the jury. (R. 101-114.)

As was stated by Petitioner in his brief to the court below (Pp. 20-21) it should be immediately noticed that—

> "* * * two words have been added in the indictment to the language of Paragraph No. 11 of the form prescribed by the Secretary. The two words are 'and activities' after the word 'business.' Furthermore the word 'part' has been substituted for the word 'nature.'
>
> "Why were these changes made in the charging part of the indictment? It cannot be by accident. Is it because the meaning of the added and substituted words are the same as those to which they are added or for which they are substituted?
>
> "A request for the *nature* of one's business asks something about the business: what kind is it? A

request for the *'activities'* of the registrant asks for some information, not about the business, but about him, the registrant: what has he been doing? what acts? An entirely different inquiry—as was recognized by the Congress in the subsequent New Act providing in Section 2(a) (3) that a registrant must give a comprehensive statement of the nature of his business and in Section 2(a) (4) and (6) that he must report all of his activities.

"The fact of the addition by the drafter of the indictment of the words 'and activities' gives far greater latitude as to what can be alleged and proved. Under 'nature of business' the facts to be elicited are limited to the kind of business. On the other hand, the inquiry into the 'activities' of the registrant may include *all the acts done by him*, not only in his business, but in addition, all the acts of every kind and nature done by the registrant during the period under inquiry; that is, the indictment anticipated the requirements of the New Act of April 29, 1942."

It was because of this attempted change in the terms of Section 3(c) of the Act of 1938 as amended and of the terms of Paragraph 11 of the supplemental registration form and the failure of the trial court to sustain either the demurrer or the motion to dismiss as to these three counts of the indictment pertaining to the supplementary registration statements, that the floodgates of testimony were opened and the chief prosecuting attorney could not only secure the introduction in evidence of *Spreading Germs of Hate* and read copiously therefrom during the course of the trial, but could succeed in convincing the jury that the petitioner was serving his "Teutonic overlords of Berlin" and was trying to divide us and literally beat our brains out!

Without laboring this point we respectfully submit that petitioner fully and fairly answered Paragraphs 11 of the three supplemental registration statements; that he was indicted for one offense—of failing to report "as a part of his business and activities" certain activities named in the indictment—not covered by Section 3 of the amended

Act of 1938 and Section 5 of the unamended Act of 1938; and that he was tried for another offense—that of being a propagandist—in league with the forces of evil—which likewise was not within said sections of the statute. In addition, we submit that the efforts of the chief prosecuting attorney, Mr. Maloney, went far beyond what should be the efforts of a Government attorney in any case—to see that justice is done in accordance with the law and the facts, nothing more and nothing less!

## III.

### There Was No Wilful Intent Shown of Petitioner to Violate the Law Requiring the Registration of Agents of Foreign Principals.

Petitioner filed all of the requisite original and supplemental registration statements. A demurrer was sustained as to Counts I and IV of the indictment relating to the original registration statements. It is not charged in the indictment that petitioner violated the law in his answers to any of the 19 paragraphs of the three supplemental registration statements except Paragraphs 11 requiring that he "Give a comprehensive statement of the nature of business of registrant."

In other words, petitioner fully and completely answered all of the paragraphs of the original registration statement which he was required by Section 2 of the unamended Act of 1938 to answer. Also, he fully and completely answered all of the paragraphs of the supplemental registration statements which he was required by Section 3(a) and (b), as amended, to answer. His indictment is on the alleged ground that he did not fully answer Paragraphs 11 of the supplemental registration forms and which Paragraphs 11 find their basis in Section 3(c) of the 1938 Act as amended, though the prosecution attempts to rest that paragraph of the supplemental registration form on paragraph 12 of the Regulations and failing that, to fall back upon the general

terms of the statute to prevent propaganda in the United States.

We have heretofore pointed out that petitioner—to the point of making himself a nuisance—persisted in notifying the Department of State of each of his contracts of employment, forwarding copies thereof, and inquiring whether he was expected to do anything more. Also, we have pointed out that two of the three supplemental registration statements forming the basis of two counts of the indictment were executed before his chief trial counsel as notary public and that his second original registration statement was likewise so executed. The inference is unmistakable that he took these statements to his attorneys and secured their advice before they were executed and filed with the Secretary of State.

*Williamson* v. *United States*, 207 U. S. 425, and *United States* v. *Murdock*, 290 U. S. 389, are in point.

In the *Williamson case* the indictment was against a member of the Congress and two others for conspiring to commit the crime of subornation of perjury. Mr. Justice, later Chief Justice, White delivered the opinion of the Court and stated at page 453 with respect to the question of reliance upon the advice of counsel, as follows:

> "Without attempting to review in detail the requested charges concerning motive and intent and the effect of advice of counsel, we think the trial judge in instructing the jury on the subject went as far in favor of the accused as it was possible for him to go consistently with right, and therefore there is no ground for complaint as to the failure to give the requested charges. The court after having fully and carefully instructed the jury as to the operative effect of good faith in relieving the defendants from the charge made against them, in express terms noticed the question of advice of counsel and said:
>
> "'Having now placed before you the timber and stone Law and what it denounces, and what it permits, if a man honestly and in good faith seeks advice of a lawyer as to what he may lawfully do in the matter of

loaning moneys to applicants under it, and fully and honestly lays all the facts before his counsel, and in good faith and honesty follows such advice, relying upon it and believing it to be correct, and only intends that his acts shall be lawful, he could not be convicted of crime which involves wilful and unlawful intent; even if such advice were an inaccurate construction of the law. But, on the other hand, no man can wilfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel!

* * * * * * *

"But, as of course, in a criminal case, doubt must be resolved in favor of the accused, we hold that the indictment does not charge conspiracy to suborn perjury in respect to making of the final proofs, and therefore that there was prejudicial error committed in the instructions to the jury which were excepted to."

The *Murdock case* was a prosecution under the Internal Revenue Act for "wilfully" failing to supply information, which defendant had refused to supply on the ground that to do so might subject him to prosecution under State Laws. The defendant requested the following instruction: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the question was wilful."

Mr. Justice Roberts delivered the opinion of the Court, defined wilfulness as used in criminal statutes and in approving the requested instruction stated that:

"This court has held that where directions as to the method of conducting a business are embodied in a revenue act to prevent loss of taxes, and the act declares a wilful failure to observe the directions a penal offense, an evil motive is a constituent element of the crime. In *Felton* v. *United States, supra*, the court considered a statute which * * *. In an action for the statutory penalty the conduct of the distiller was held not to be wilful within the meaning of the law.

"Aid in arriving at the meaning of the word 'wilfully' may be afforded by the context in which it is used (*United States* v. *Sioux City Stock Yards Co.*, 162 Fed. 556, 562), and, we think, in the present instance the other omissions which the statute denounces in the same sentence only if wilful, aid in ascertaining the meaning as respects the offense here charged. The Revenue Acts command the citizen, where required by law or regulations, to pay the tax, to make a return, to keep records, and to supply information for computation, assessment or collection of the tax. He whose conduct is defined as criminal is one who 'wilfully' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. *Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be wilful, to be criminal is persuasive that the same element is essential to the offense of failing to supply information.*

"* * * *Here we are concerned with a statute which denounces a wilful failure to do various things thought to be requisite to a proper administration of the income tax law, and the Government, in the trial below, we think correctly, assumed that it carried the burden of showing more than a mere voluntary failure to supply information, with intent, in good faith, to exercise a privilege granted the witness by the Constitution. The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense.*" (Italics mine.)

Here the prosecution made no effort to carry the burden of showing more than a mere failure to report the alleged omitted activities, every one of which was, either directly or indirectly, non-interventionist in character and not one of which was hostile to the institutions of the United States Government. If it be said that peti-

tioner did not request sufficiently specific instructions on the necessity for, and burden of proof in establishing wilful intent to omit material facts from the supplemental registration statements, the failure to do so is due to the fact that the chief defense trial counsel was taken out of the case before the prayers for instructions were prepared and submitted. Due to this fact, an even greater burden rested upon the trial court to see that petitioner's legal rights did not suffer by the forced withdrawal of the chief defense counsel. See *Glasser* v. *United States, supra.*

**Scienter.**

"Scienter" seems to be chiefly relied upon by the prosecution to establish a wilful omission to violate the 1938 Act as amended, citing *United States* v. *Ragen*, 314 U. S. 513 and other cases. (Gov. Br. 25-26.) This word "scienter" is retained from an old Latin form of pleading, signifying, in the connection commonly used, that the alleged crime was done designedly, understandingly, knowingly, or with guilty knowledge. *People* v. *Gould*, 237 Mich. 156, 211 N. W. 348.

Apparently the attempt to establish scienter on the part of petitioner for omitting to name the charged activities in answer to Paragraphs 11 of the three supplemental registration statements is based on extracts from his book, *Spreading Germs of Hate*, wherein the petitioner has pointed out the necessity for the concealment of the origins of propaganda if it is to be effective. This book was not a concealment; it was a revealment and written for the laudable purpose of attempting to make the people of the United States immune to propaganda. That book concerning events in 1914 to 1919 most certainly can not be used to establish that in 1940 to 1941, during the period covered by these three supplemental registration statements, the petitioner designedly, understandingly, knowingly or with guilty knowledge omitted to report the charged

activities in response to the requirements of Paragraphs 11 of the said statements.

The evidence in the record negatives any such conclusion. In addition to petitioner's concern that he duly and properly conform to the law and the forms in registering, lack of wilful intent on his part is shown by the evident fact that he consulted with his counsel as to the preparation and filing of two of the three supplemental registration forms; and the further fact that he cancelled one of his foreign agency contracts on July 2, 1941 and the other on September 8, 1941, while there remained in effect the Neutrality Act of 1939 and diplomatic relations continued with the German Reich.

The book itself shows something of petitioner's loyalty to the United States during the last World War when he assisted in Liberty Bond drives, located persons on farms who could help produce food for winning the war and not be a burden on the taxpayers, and he received official thanks for "effectiveness of his official advice." (Gov. Ex. 12, p. 167.)

## IV.

## The Court Below Erred in Not Reversing the Trial Court for Errors in Instructions to the Jury.

### (a).

### Error in giving general instruction as to purposes of the 1938 Act as amended.

Aside from the fact that reports of Congressional Committees may not be referred to in interpreting a statute which is clear on its face and not ambiguous and that the intent of a criminal statute must be drawn from the four corners thereof, the trial court over-shot the case before it. The instructions of the court went far beyond the charges in remaining Counts II, III and V of the indictment.

This was not a case of failure to register, or even failure to file the requisite registration statements. All these had

been filed within the time allowed therefor. The two original registrations were not before the jury because the demurrer had been sustained as to Counts I and IV of the indictment which concerned them.

In a trial for wilfully omitting to report "as a part of his business and activities" in response to Paragraphs 11 of the three supplemental forms, all of the discussion of the court in its general charge to the jury about the purposes of the 1938 Act, as amended, as shown by the Committee Report in 1935 (House Report No. 153, 74th Congress, February 15, 1935) had no place in the case. What it in fact did do was to tie into the charge of the prosecuting attorney that petitioner was being tried for propagandizing; that he was serving his "Teutonic overlords in Berlin"; whether Congressman Fish would know a propagandist if he saw one; etc., etc.

Petitioner was being tried under Section 3 of the amended Act; the penal provision in Section 5 of the unamended Act; Paragraph 11 of the supplemental registration forms; and the regulations relating to supplemental registrations. Extended discussion of the contents of a 1935 House of Representatives' report in a general charge to a jury concerning an alleged crime arising under a 1938 Act amended in 1939 of wilfully omitting to report certain activities was clearly erroneous and under the circumstances constituted reversible error. If allowable at all, such a charge more nearly fitted a case where the defendant had failed to register.

*Standard Fashion Co.* v. *Magrane Houston Co.*, 258 U. S. 346.
*Railroad Commission* v. *C. B. & Q. R. R.*, 257 U. S. 563.
*McLean* v. *United States*, 226 U. S. 374.
*Binns* v. *United States*, 194 U. S. 486.
*Caminetti* v. *United States*, 242 U. S. 470.

**(b)**

**Error in giving the Government's prayers Nos. 2A, 2 and 8 and in refusing to give petitioner's prayer No. 19.**

These four prayers, the objections and the exceptions thereto are contained in the Record (R. 96-114). By the denial of the petitioner's prayer and the grant of the other three, the trial court, in effect, instructed the jury that if it found the petitioner omitted to report any material activity charged in the indictment and proved by the evidence, the jury could convict the petitioner without the necessity of determining whether in such omitted activity the petitioner was acting for a foreign principal or on his own initiative and for his own purposes.

There has been discussed elsewhere in this brief the position of petitioner that he was not required to report any activities in response to Paragraphs 11 of the supplemental registration forms, only "Give a comprehensive statement of nature of business of registrant" and that he certainly was not required to report any activities except such as he might have performed for a foreign principal for hire—and since he performed none, there was nothing concerning activities for him to report.

It will be added here that these three government prayers and the court in granting them anticipated the requirements of the New Act of April 29, 1942, which provided in Section 2(a) (4) and (6) that a registrant must report as "material" information:

> "(4) * * * the existing and proposed activities engaged in or to be engaged in by the registrant as agent of a foreign principal for each such foreign principal."
>
> "(6) A detailed statement of every activity which the registrant is performing or is assuming or purporting or has agreed to perform for himself or any other person other than a foreign principal and which requires his registration hereunder." (Pet. Br. 73.)

The original Act of 1938, as amended, by the Act of 1939, as well as the New Act of April, 1942, are printed in the appendix to petitioner's brief for the writ of certiorari and the Court's attention is invited to the fact that the latter Act is as detailed and complete as the original Act as amended is incomplete. The Government has referred in its brief below and in its brief here to a statement in a Committee report that this Section 2 of the New Act is merely declaratory of the requirements under Section 2 of the then existing statute. (Gov. Br. 18.)

In the first place, an examination of the two Sections 2 in the 1938 Act and in the 1942 Act is sufficient to show their vast differences.

In the second place, there is involved here Section 3 of the 1938 Act, as amended, pertaining to supplemental registrations. The petitioner was not tried and convicted for failing to properly file original registration statements, under Section 2 of the 1938 Act. While he was indicted for alleged failure to do so, these Counts I and IV were thrown out on demurrer. Petitioner was tried and convicted for alleged failure to file supplemental registration statements which were issued under, and which registration forms were issued pursuant to Section 3 of the 1938 Act as amended.

The New Act of 1942 combines in Section 2, both Sections 2 and 3 of the 1938 Act as amended and adds many new and detailed requirements.

Regardless of such statements in a Committee report, we have here two different statutes both in terms and in arrangements.

## V.

### The Court Below Erred in Not Reversing the Trial Court Because It Added to the Penalty Provided in Section 5 of the 1938 Act.

This penal Section 5 of the 1938 amended Act is quoted in full elsewhere in this brief (*ante*, p. 38) and it is also printed in the appendix to the petitioner's brief for cer-

tiorari. (P. 66.) It provides for punishment, upon conviction, of a fine not exceeding $1,000 and for imprisonment for not exceeding two years. Under each of three counts of the indictment relating to three supplemental registration statements, the petitioner was sentenced to pay a fine of $500 on each count, to be imprisoned in a penitentiary for a period of eight months to two years on each count, and to pay the costs of the trial (R. 325), the sentences to run consecutively and not concurrently.

The said Section 5 of the indictment does not authorize the additional penalty of the costs of the trial. This additional penalty was purportedly imposed pursuant to a section in the Act of May 8, 1792, c. 36, (1 Stat. 277) (28 U. S. C. 822) which provide that:

> "822. *Same: fines or forfeitures.* When judgment is rendered against the defendant in a prosecution for any fine or forfeiture incurred under a statute of the United States, he shall be subject to the payment of costs; and on every conviction for any other offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

This prosecution, of course, was not one for a fine or forfeiture as that term is used in the fiscal laws of the United States, to which the 1792 statute apparently relates with respect to this section. The sentence, if sustainable at all, must be sustained under the latter part of the Section that "on every conviction for any offense not capital, the court may, in its discretion, award that the defendant shall pay the costs of the prosecution."

We think that this sentence can not come under this latter part of the Section. The petitioner was subjected to a penalty of a fine and imprisonment, as specifically provided in Section 5 of the 1938 Act. This latter statute, being some one hundred and fifty years subsequent to the 1792 statute, fully covered the entire subject matter and specifically provided the penalty to be imposed. Presumably the fine authorized and imposed in this case had some relation

to the expense of prosecution. The imposition of a further penalty of the costs of the prosecution amounts to a double penalty.

It is admitted by petitioner that the cases are none too clear on this point. *Re Swan*, 150 U. S. 637, left the question undecided. *Oates* v. *United States*, 233 Fed. 201, 207, was a sentence, in contempt proceedings, of imprisonment and costs of the trial under Section 268 Judicial Code (28 U. S. C. 385) which authorized a fine or imprisonment as punishment. The court did not impose imprisonment and a fine and cost of the trial, as here, but only imprisonment and costs. Other questions were involved and this Court denied certiorari in 242 U. S. 633.

*Whitworth* v. *United States*, 114 Fed. 302, upon which the court below relied, was a sentence of imprisonment and fine and costs of the trial for embezzling funds of the United States. Title 18, U. S. C. 355 authorized imprisonment or fine equal to the amount of money embezzled or both. The trial court imposed a sentence of imprisonment, a fine and the costs of the trial but the Court of Appeals filed an opinion reversing the sentence because of the additional penalty of the fine. Some time later, the exact date not being shown, the court appended what appears to be an *ex parte* statement at the foot of the opinion, to the effect that its attention had not been invited to what is now Title 28, U. S. C. 822 and that the said court was in error in reversing the case.

Upon principle, it would appear that when a statute has fully covered the subject matter—in this case the penalty of fine and imprisonment for alleged violation of said statute—such covering is exclusive and inclusive. The court is not justified in going back to a general statute of a Century and a half ago to add to that penalty of fine and imprisonment the costs of the trial—which costs may many times exceed the amount of the statutory penalty. If the 1938 Act had not provided for a cash penalty or if the prosecution had been under the fiscal laws of the United

States, it may be that a different question would be presented.

## CREDO OF THE PETITIONER.

The petitioner has written many books, both of prose and poetry, and he has written many magazine articles. The prosecution has seen fit to single out one of these books, *Spreading Germs of Hate,* and by reading to the jury and bringing to the attention of the Court isolated passages therefrom, the Government seeks to sustain a conviction and sentence which petitioner believes to be most unjust. It seems well in closing this brief to invite the attention of the Court to another book written by the petitioner entitled *The Seven Against Man.*

This essay was originally published in *Books Abroad,* a literary quarterly edited by the University of Oklahoma, and it was issued in book form about 1940. The book was introduced in evidence in the trial (Tr. 1322) and an extract therefrom read to the jury. (Tr. 1368-1379.) In this book, petitioner referred to Galileo, Luther, Rousseau, Darwin, Karl Marx, Freud, and Einstein as thinkers who have disturbed man's sense of security in this world and said that:

> "Weary of frustration, man seeks happiness in strange paths. The turmoil of the human race, the strange revulsion of the spirit which gave birth to the Totalitarian State, are mankind's desperate efforts to create a new certainty, a new absolute, a new religion, to find somewhere, somehow, Salvation. They are the ache of Chaos struggling to subdue itself. For the Divine Order of the past, the Nazis substitute for blood and soil—*Blubo;* Mussolini, syndicalism and his own omnipotence; Bolshevism, the Dictatorship of the Proletariat incarnated in Stalin; Roosevelt, fumblingly, the New Deal. Wittingly or unwittingly, Roosevelt treads the same path as those whom he calls 'dictators.'"

* * * * * * * * *

"The Totalitarian idea may save us from wreckage in a storm; as a temporary refuge it may serve nations and individuals in dire emergencies. National Socialism was Germany's only salvation at this particular juncture of time and history. The new energies released in the nation by the genius of Hitler may compensate the German people for the sacrifices imposed by the iron discipline which the Nazi creed imposes on the individual. But National Socialism is not a universal panacea.

* * * * * * * * * *

"Whatever shape it may assume in the New World or the Old, collectivism as a final objective is not compatible with human dignity. Collectivism, unless it assumes forms not yet discernible today, spells the end of all progress and reduces man to the state of the insect, the insect that never changes in a million years; the insect that pays for its ordered life with the complete loss of individuality. It sometimes seems to me that even chaos is preferable to a soulless society, eternally frozen. While there is chaos there may be hope. The way of the bee and the ant, may be the way of the life to come; it may be the next and final phase of human evolution. I, for one, prefer the nobler past and a less inglorious future."

## CONCLUSION.

Upon the whole case, it is submitted that the courts below should be reversed with direction that the indictment in its entirety be dismissed as not stating a crime against the United States.

Respectfully submitted,

O. R. McGuire,
*Attorney for Petitioner,*

January 5, 1943.